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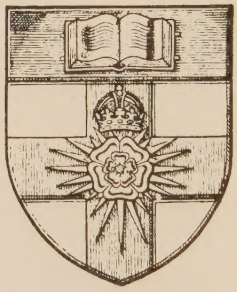

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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

BETTS *v.* STEVENS.

1909
Oct. 13.

Motor Car—Driver exceeding Speed Limit—Police Trap—Warning given to Driver by Third Person—Wilful Obstruction of Constable in Execution of his Duty—Prevention of Crimes Amendment Act, 1885 (48 & 49 *Vict. c.* 75), *s.* 2.

Constables were on duty observing and timing the speed of motor cars driven along a certain road with a view to the prosecution of the drivers of such cars as should be travelling at an illegal speed. For that purpose they had measured a certain distance along the road. The defendant warned the drivers of cars which were approaching the measured distance of the presence of the constables and the purpose for which they were there. There was evidence that at the time the warning was given the cars were being driven at an illegal speed, and the drivers upon receipt of the warning slackened their speed and proceeded over the measured distance at a lawful speed, whereby the constables, as the defendant intended, were prevented from obtaining such evidence as would be accepted as sufficient in a police court that the drivers of the cars were committing an offence:—

Held, that the defendant had wilfully obstructed the constables in the execution of their duty within the meaning of the Prevention of Crimes Amendment Acts.

Case stated by justices of Surrey.

An information was laid by the respondent, Alfred Stevens, an

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inspector of police, against the appellant for having on February 21, 1909, unlawfully obstructed Charles Pyke, a county police officer, in the execution of his duty, contrary to 48 & 49 Vict. c. 75, s. 2.

Upon the hearing of the information the following facts were proved:—

On February 21, 1909, police officers Stevens, Baker, Pyke, Sadler, and Butler were on duty at Rodborough Hill, in the parish of Witley, observing and timing the speed of motor cars driven along the road for the purpose of securing that such cars should not be driven at an unlawful rate of speed or otherwise in contravention of the Motor Car Act, 1903, and for that purpose there had been measured a certain distance along the road called and intended to be used as a "motor car control" by the said police officers. On that day police constable Butler was at the commencement of the control, and it was his duty to signal to Sergeant Pyke when motor cars passed him. Sergeant Pyke stood at the end of the control and held a stop watch, and it was his duty to set the watch going when he received a signal from Butler, and to stop it when the motor cars passed him. In this way the speed at which motor cars passed along the said road could be satisfactorily proved in the event of the speed exceeding that allowed by law. All the said police officers were acting as such under the orders of their superior officers and for the purposes aforesaid.

The appellant is in the employ of the Automobile Association and is called a "sergeant of patrols."

About 2.25 P.M. on the date aforesaid Stevens, Baker, and Sadler were stationed at the top of Rodborough Hill and about 440 yards from the commencement of the control. The appellant was then at the top of Rodborough Hill, standing close to Stevens, Baker, and Sadler, wearing a yellow badge round his arm with "A. A. sergeant" upon it. The appellant knew the said officers were police officers and that they were there on duty for the purpose aforesaid. Stevens said to the appellant, "I have Sergeant Pyke and other officers timing cars at the bottom of the hill and I do not want your assistance." The appellant made no answer, but rode down the hill on his bicycle. Stevens, Baker,

and Sadler remained at the top of the hill. The appellant then returned and showed a red badge marked "A. A. 41." He got off his bicycle and stood by the side of Stevens, Baker, and Sadler for about an hour. Between 2.27 P.M. and 3.20 P.M. eleven motor cars passed Stevens, Baker, and Sadler, which were travelling at over twenty miles an hour. Each of these eleven cars carried a badge with the letters "A. A." upon it, which letters indicated that the owner of the car was a member of the Automobile Association.

The appellant by signalling with his red badge warned the driver of each of the said eleven cars of the fact that the police were on duty on the control for the purposes aforesaid. The drivers understood the meaning of and at once acted on the warning signals indicated by the red badge, and the cars were slowed down in consequence of such warning and passed through the measured distance at a rate under twenty miles an hour, but were signalled by Butler and timed by Pyke, the police officers engaged in that part of their duty. Pyke timed eighteen cars, including the said eleven cars, over this measured distance, none of which were then exceeding twenty miles an hour.

The justices were of opinion upon the above facts that the appellant did obstruct Pyke in the execution of his duty and accordingly convicted him subject to a case for the opinion of the High Court.

Isaacs, *K.C.*, *Danckwerts*, *K.C.*, and *Harker*, for the appellant. The act of the appellant did not amount to an obstruction of the police. In *Bastable* v. *Little* (1), where the facts were precisely similar, with the exception that there was in that case no evidence that the cars were going at an illegal speed when the warning was given, it was held that the giving of the warning, with the object of preventing the police from getting evidence that the cars were exceeding the speed limit if in fact they were so doing, did not constitute an obstruction of the police within the meaning of s. 2 of the Prevention of Crimes Amendment Act, 1885. Lord Alverstone C.J. there said: "I think that the section points

(1) [1907] 1 K. B. 59.

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to something done in regard to the duty which the constable is performing, and does not apply to what is done or said to third parties. To take an instance which was put during the argument: suppose a party of men are engaged in the offence of night poaching, and a person passing near warns them that the police are coming, I think it is clear that that could not be held to be an offence within this section." And it can make no difference that there was evidence that the cars were offending before the warning was given. The police were there for the purpose of procuring evidence to secure convictions, and if they had already got evidence of an offence before the warning was given, what happened afterwards becomes immaterial. In the illustration of the night poachers put by Lord Alverstone the poachers were already committing an offence before they received the warning, and yet he held the giving of the warning would be no obstruction of the police. Further, the only policeman that the appellant was charged with obstructing was Pyke, and Pyke's duty was to time the cars over the measured distance on receiving a signal from Butler. But he was not prevented from performing that duty, for he in fact did time them. Secondly, assuming that the appellant did obstruct the police in procuring evidence against offending cars, the procurement of that evidence was no part of their duty as policemen. These constables were Surrey county constables, and by the County and District Constables Act, 1839 (2 & 3 Vict. c. 93), s. 8, they had the same powers, privileges, and duties throughout the county of Surrey as "any constable duly appointed has within his constablewick by virtue of the common law, or of any statute made or to be made." But there is no rule of the common law nor any statute imposing any special duty upon constables as distinguished from other members of the public to collect evidence of offences which they suspect to have been committed. No doubt a constable who collects such evidence does so in obedience to the orders of his superior officer, but that does not make it his duty within the meaning of the section under which the appellant was convicted. Then if it was not the duty of the constables to collect the evidence the obstruction of them was no offence. In *Codd* v.

Cabe (1), where a warrant had been issued for the apprehension of the appellant for an offence less than felony and the constable to whom the warrant was directed attempted to arrest him without having the warrant in his possession, and the appellant assaulted the constable, it was held that the appellant could not be convicted of assaulting the constable in the execution of his duty. And the cases of *Reg.* v. *Sanders* (2) and *Reg.* v. *Cumpton* (3) are to the like effect.

Avory, K.C., and *Bodkin*, for the respondent, were not called upon.

LORD ALVERSTONE C.J. In this case the magistrates have convicted the appellant, who is in the employment of the Automobile Association, of obstructing a police officer named Pyke in the execution of his duty. The facts appear to have been these. Butler, acting on the instructions of Stevens, his superior officer, and being one of a body of five policemen among whom the duty on which they were engaged was divided, was at the entrance of what has been called the control, while Pyke was at the exit of the control. Stevens, Sadler, and Baker were stationed at a distance of 440 yards from the control. It is found as a fact that a considerable number of cars approaching the control were travelling at an excessive speed, that is to say, above twenty miles an hour. Under those circumstances the appellant, knowing that the cars would in a very short distance enter the control, gave them a warning, in consequence of which their speed was slackened. Mr. Isaacs on behalf of the appellant contended that he did not obstruct the police in the execution of their duty to procure the evidence necessary to secure convictions, because they had already got sufficient evidence to satisfy the magistrates that the cars just before they entered the control were travelling at an illegal speed. There is no doubt a finding to that effect in the special case, but I entertain little doubt that that finding was based upon some admissions made by the appellant's counsel at the hearing. So far as I can gather from his speech, which I have looked through,

(1) (1876) 1 Ex. D. 352. (2) (1867) L. R. 1 C. C. R. 75.
(3) (1880) 5 Q. B. D. 341.

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Lord Alverstone C.J.

he did not dispute the fact, and under those circumstances I do not think that we can adopt the suggestion that the timing of the cars was immaterial for the purposes of a conviction of the offending drivers. There are many cases, as we all know, in which the accuracy of a statement made by persons who estimate that particular cars were going at a high rate of speed is so much questioned that it is absolutely necessary to have something in the nature of direct proof of the speed, and it is for that purpose that these controls, as they are called, are measured upon the roads by the police. Now Pyke was stationed at the far end of the control in order that he might act in conjunction with Butler in timing the speed of the cars which, on the evidence before the magistrates, were breaking the law immediately before they reached Butler, and it is clear to my mind that the magistrates must have come to the conclusion that, but for what the appellant did, the cars would have passed through the control at a speed exceeding twenty miles an hour. We have, then, this state of things, that an offence was being committed in view of certain of the men who were there for the purpose of ascertaining whether an offence was being committed or not. Proof of that offence would of course depend upon the nature of the evidence given, and the evidence of those men, who merely estimated the pace at which the cars were going, might be seriously questioned, and it might be very difficult to obtain a conviction unless that evidence was supported by the further evidence of witnesses who timed the cars in the immediate proximity of the place where they were first seen and believed to be travelling at this high rate of speed. In my opinion a man who, finding that a car is breaking the law, warns the driver, so that the speed of the car is slackened, and the police are thereby prevented from ascertaining the speed and so are prevented from obtaining the only evidence upon which, according to our experience, Courts will act with confidence, is obstructing the police in the execution of their duty. This is exactly the kind of case that I had in my mind when the case of *Bastable* v. *Little* (1) was before us, and which led me, after Ridley J. had, as I thought, put too narrow a construction on the word "obstruct,"

(1) [1907] 1 K. B. 59.

to say that I could not agree in the view that physical obstruction or threats were the only kinds of acts that would come within the section. However, nothing that I now say must be construed to mean that the mere giving of a warning to a passing car that the driver must look out as there is a police trap ahead will amount to an obstruction of the police in the execution of their duty in the absence of evidence that the car was going at an illegal speed at the time of the warning given; but where it is found, as in this case, that the cars were already breaking the law at the time of the warning, and that the act of the person giving the warning prevented the police from getting the only evidence which would be required for the purposes of the case, there I think the warning does amount to obstruction. In *Bastable* v. *Little* (1) I based my judgment upon the fact that there was no evidence that any of the cars were going at an unlawful speed, and I refused to draw the conclusion that they must have been breaking the law at the time of the warning from the mere fact that upon its being given they slackened their speed. Then Mr. Isaacs contended that, if the acts of the appellant amounted to an obstruction of the police, it was not an obstruction of the police in the execution of their duty as such. He said that there was no statutory duty upon the police to measure distances upon the road or to time cars. It may be perfectly true that it is only one method of proving the fact of which the police desire to obtain evidence or desire to prove circumstantially; but where you have got the evidence of a superior officer, and the superior officer telling the policeman to do certain things, and when those acts of the superior officer and of his subordinates are for the purpose of proving that an offence which is being committed in the eyes of the policeman is committed, it seems to me impossible to say that, because the statute does not expressly say that the policeman may use the particular means for obtaining the required evidence that he does use, it is not his duty to obtain it by those means, and that the person who frustrates him in his attempt to so obtain it is not guilty of obstructing him in the execution of his duty. The appeal must be dismissed.

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DARLING J. I am of the same opinion. The case states that the policemen were engaged in timing the speed of motor cars driven along a certain road for the purpose of securing that such cars should not be driven at an unlawful rate of speed or otherwise in contravention of the Motor Car Act. It is perfectly plain that it is the duty of the police to prevent the contravention in certain respects of that Act of Parliament, and I have come to the conclusion that the policemen in question, including Pyke, were engaged upon what was their duty as policemen.

Then comes the question, Did the appellant, in doing what he did, wilfully obstruct the police in the execution of their duty? The case finds that a continuous unlawful act was in course of being committed by various people, inasmuch as those people were driving motor cars faster than is lawful under the statute regulating such driving. The policeman Pyke was endeavouring to collect evidence of what was the pace of the cars before the measured distance was entered on by ascertaining what was the pace of the cars within the measured distance. The appellant in effect advised the drivers of those cars which were proceeding at an unlawful speed not to go on committing an unlawful act. [If that advice were given simply with a view to prevent the continuance of the unlawful act and procure observance of the law, I should say that there would not be an obstruction of the police in the execution of their duty of collecting evidence beyond the point at which the appellant intervened. The gist of the offence to my mind lies in the intention with which the thing is done. In my judgment in *Bastable* v. *Little* (1) I used these words: "In my opinion it is quite easy to distinguish the cases where a warning is given with the object of preventing the commission of a crime from the cases in which the crime is being committed and the warning is given in order that the commission of the crime may be suspended while there is danger of detection." I desire to repeat those words. Here I think it is perfectly plain upon the facts found by the magistrates in this case that the object of Betts' intervention was that the offence which was being

(1) [1907] 1 K. B. 59

committed should be suspended or desisted from merely whilst there was danger of the police detecting it and taking evidence of it, and that therefore he was obstructing the police in their duty to collect evidence of an offence which had been committed and was being committed. He did that wilfully in order to obstruct them in their duty, and not in order to assist them in the performance of their duty, nor in order to prevent a motorist upon the road from committing an offence. I think the decision at which the magistrates arrived was correct, and that the conviction should be affirmed.

BUCKNILL J. I must admit that at one time I had considerable doubt about this case, but during the course of the argument I have come to the conclusion that the appeal should be dismissed. The first question we have to ask ourselves is what was the duty which was being executed by the police officer Pyke? It has been contended that it was not a duty within the meaning of the section; that the word "duty" in the section means some special duty which is laid by the common law or by some statute upon constables as distinguished from other members of the community. I cannot accept that contention. These five police officers were on duty in the ordinary sense of that term, and their duty was to act together and assist each other in obtaining proof of the speed of certain cars which were travelling on the road. These cars when they were seen by the first three of the policemen were proceeding at an illegal speed, and the appellant, with the intention of preventing the policemen from obtaining the necessary evidence of that speed, persistently stationed himself in a particular position and gave to the passing cars a signal, which they well understood, that there was a police trap ahead. It cannot be doubted that if the appellant had not given this signal the cars, in ignorance of the trap, would have proceeded at the same illegal speed for some time, whereas on receipt of the signal they reduced their speed within the legal limit until they reached Pyke. The result was that the operations of the police were rendered abortive by the act of the appellant. He intentionally and successfully prevented the police from obtaining evidence of the commission of an offence by the drivers of the

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cars, and in so doing he, in my opinion, wilfully obstructed the police in the execution of their duty.

Appeal dismissed.

Solicitors for appellant: *Amery, Parkes & Co.*

Solicitor for respondent: *D. M. White, for Kempson, Farnham.*

J F. C.

1909

Oct. 13, 25.

THE KING *v.* SHANN AND OTHERS.

Licensing Acts—"On" Licence—Application for Renewal—Differentiation between redundant Houses—What Matters Compensation Authority may take into consideration—Licensing Act, 1904 (4 *Edw.* 7, c. 23).

Where under the Licensing Act, 1904, the question of the renewal of two "on" licences was referred to the compensation authority, and the compensation authority were satisfied that only one of them was required for the needs of the neighbourhood:—

Held that, for the purpose of differentiating between the two licensed houses and deciding which of the licences should be renewed, they were entitled to take into consideration what other licences the owners of the respective licensed houses would be willing to surrender and what contribution they would be willing to make to the compensation fund in consideration of the renewal of the licence applied for.

RULES for a mandamus to the justices for the county borough of Manchester to hear and determine according to law an application for the renewal of an "on" licence in respect of a beer-house known as the Church Inn, and for a certiorari to quash an order refusing the renewal of the said licence.

The Church Inn, which was situate at 17, Russell Street, Crumpsall, in the city of Manchester, and was owned by Wilson's Brewery, Limited, had been licensed for the sale by retail of beer to be consumed on the premises from a time prior to 1869. Next door to it, at No. 19, Russell Street, was another beer-house, known as the Egerton Inn and belonging to a Mr. Holt, which had been similarly licensed from before 1869.

At the general annual licensing meeting for the city of Manchester in the year 1908 objection was made to the renewal of the licence of each of these beer-houses on the ground that neither of the licences was required, but the licences of both were

renewed, the justices suggesting that some arrangement should be made between Wilson's Brewery and Mr. Holt whereby the owner of one of the houses should purchase the other and then surrender one of the licences and rebuild the other house. Negotiations were entered into for that purpose by the owners of the said beer-houses, but proved abortive. On or about February 4, 1909, notices were served on the respective tenants of the two houses that objections would be made at the general annual licensing meeting to the renewal of the licences on the ground that the licences were not required. On February 18, at the general annual licensing meeting, the licensing justices heard applications for the renewal of the licences to both the houses, and also the objections thereto, and referred the question of their renewal together with their reports thereon to the compensation authority. Those reports stated as regards the Church Inn that there were two licensed houses within a hundred yards and three licensed houses within three hundred yards, that the vault, bar parlour, and out department were unsuitable, and that the sanitary accommodation was unsatisfactory; and as regards the Egerton Inn, that the number of licensed houses within a hundred and three hundred yards were the same as in the case of the Church Inn, that the tap-room, bar parlour, and lobby were unsuitable, and that the sanitary accommodation was unsatisfactory. On June 10 the question of the renewal of the two licences came on for hearing together before the compensation authority. The only evidence given before them in support of the objection to the renewal of the licence of the Church Inn was the evidence of a police officer, who stated on oath that the facts contained in the two reports were correct. The compensation authority also examined the plans of the two houses as they then existed, which plans had been deposited with them. These plans shewed that the accommodation of the Egerton Inn was slightly the more convenient of the two. The owners of the Church Inn through their counsel stated that in the event of their licence being renewed they would rebuild their house in accordance with certain other plans, also deposited with the compensation authority, and would surrender the licences held by them in respect of

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two other licensed houses. Counsel for the owner of the Egerton Inn made a similar offer in the event of his licence being renewed. According to an affidavit filed on behalf of Wilson's Brewery, those offers were made in answer to a question by Sir Thomas Shann, the chairman of the compensation authority, as to what offers the owners of the two licensed houses were respectively prepared to make by way of a surrender of other licences or a money payment to the compensation fund in the event of the authority renewing the licence of one of the houses and allowing the owner to rebuild his premises. That affidavit also stated that the chairman intimated that the offers were insufficient and adjourned the hearing till the following morning with a view to increased offers being made in the meantime; that on the following day, June 11, neither of the owners having increased their offers, the decision of the case was further adjourned for the same purpose to July 29; that on June 16 the owners of the Church Inn received a letter from Mr. Holt saying that he intended to offer to surrender three licensed houses; and that on July 28 they wrote to Sir Thomas Shann informing him of the receipt of that letter, and protesting against the owners of licensed property being placed in competition with one another. On July 29 the authority finally refused to renew the licence of the Church Inn and renewed that of the Egerton Inn unconditionally. In an affidavit made by Sir Thomas Shann the statement in the above-mentioned affidavit that the authority had intimated that their decision would be dependent upon the amount of the respective applicants' offers of licences or money was denied. It was therein alleged that the authority in arriving at their decision ignored the letters and offers of the applicants and decided the matter simply upon the merits as appearing from the facts stated in the licensing justices' reports and the deposited plans of the existing premises.

Rules having been obtained on behalf of the owners of the Church Inn for a mandamus and certiorari as above mentioned,

F. E. Smith, K.C., and *Overend Evans* shewed cause. The case of *Rex* v. *Johnson* (1) shews that if there was any evidence

(1) (1906) 71 J. P. 59.

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before the compensation authority differentiating the house in question from other licensed houses in the neighbourhood the Court will not interfere with their decision. Here there was some such evidence. The plans of the existing houses were put in and shewed that the accommodation of the Egerton Inn was rather more convenient than that of the Church Inn. That is enough to give the justices jurisdiction. The objection that the justices bargained with the applicants as to the price which they would pay for renewal is ill-founded, for the chairman swears that the authority ignored the offers made by the owners of the two houses respectively and decided the cases solely on the merits; and even if they had allowed their decision to be influenced by those offers there would have been no objection to their doing so. In *Leeds Corporation* v. *Ryder* (1) Lord Loreburn said, "I see no objection to arrangements being made between owners of public-houses and members of a licensing committee with a view to the suppression of licences under s. 1 of the Act—indeed, I regard that method as among the most obvious and legitimate ways of carrying out the intention of the Act."

Sir E. Carson, K.C., and *Jordan*, in support of the rules. The compensation authority are bound to act on the ordinary rules that regulate judicial proceedings. The Court cannot when deciding the question which of two applicants shall have his licence renewed put the order of the Court up to auction and sell it to the highest bidder, and that is what in substance was done here. The owner of the Egerton Inn offered to surrender three licensed houses as against the other party's two. The fact that the licence was granted to him unconditionally did not make his offer any the less binding on him. In substance it constituted a bargain. If this practice is to obtain in future the question will be, not what are the rights of the parties, but which has the longest purse. Even if the Court are satisfied that the decision was not in any way influenced by the offers, still the mere fact that justices allowed the letters containing the offers to be read in Court is enough to vitiate the proceedings. The case of *Leeds Corporation* v. *Ryder* (2) is not in point. That was not a case

(1) [1907] A. C. 420, at p. 424. (2) [1907] A. C. 420.

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between two competing owners whose licences had both been referred to the compensation authority as redundant.

Cur. adv. vult.

Oct. 25. The judgment of the COURT (Lord Alverstone C.J., Darling and Bucknill JJ.) was read by

LORD ALVERSTONE C.J. In this case rules nisi for certiorari and mandamus were obtained by Sir Edward Carson, calling upon the compensation authority of the city of Manchester to shew cause why a certain order made by them should not be quashed and a mandamus issued to them to hear and determine certain applications with regard to certain licences. The grounds were that the justices in making the order objected to improperly received evidence which was not admissible and neglected to hear and determine the applications in accordance with law.

The substantial facts are not in dispute. Two beer-houses, both in existence in the year 1869, and named respectively the Church Inn and the Egerton Inn, were situated side by side in Russell Street, Higher Crumpsall, Manchester. Applications were made at the annual licensing meeting for the renewal of the licences. They were both renewed at the meeting held in the year 1908, but intimation was given that when any future application was made the question of renewal would be considered. Objection had been raised that neither of the houses was required, and upon granting the renewal the justices suggested that some arrangement should be made for the surrender of one of the licences. In the month of February, 1909, notices of objection were served upon the licensee of each of the houses, objecting to their renewal on the ground that they were not required. These applications were heard on February 18, 1909, and were referred to the compensation authority, and on June 10, 1909, the question of the renewal of the licences was considered by the compensation authority. The report to the compensation authority in respect of the Church Inn was put in evidence before us. It was stated in the affidavits filed on behalf of the licensees that no question was raised before the compensation authority as to there being too many licensed houses for

the requirements of the neighbourhood in the district. This statement was contradicted by the affidavits filed on behalf of the justices, and we are satisfied, after carefully considering those affidavits, that the question of the redundancy or excessive number of public-houses was distinctly raised, and that the Court clearly intimated that in their opinion the renewal of the licence of one of the two houses would have to be refused. It was in evidence that the accommodation and arrangements at both of the houses, the Church Inn and the Egerton Inn, were defective, and plans were produced for rebuilding both. Upon the occasion of the further hearing of the applications for renewal questions were raised as to what, if any, other licences the owners of the two inns were prepared to surrender or what payment they were prepared to make to the compensation fund in the event of the licences being renewed. Offers were made by both parties, and the cases were adjourned in order that the parties might consider whether either of the parties should make an increased offer, and on June 11 the case was again adjourned to July 29 to see whether any further offer would be made by either party. Certain letters were written to the chairman, Sir Thomas Shann, but he stated in his affidavit that it was unanimously decided that the contents of the letters should be ignored and the cases decided upon the merits.

The main ground urged by Sir Edward Carson in support of the rules was that the renewing justices had not, nor had the compensation authority, any right to consider any question of offers made by the licensees respectively as to what the owners were prepared to do in the way of surrender of other licences or contribution to the compensation fund if their licences were renewed, and he contended that the consideration and reception of such offers vitiated the subsequent proceedings and established his contention that the renewing magistrates acted beyond their jurisdiction, even though they had disregarded the offers in coming to their decision. If we thought that it was improper for the renewing magistrates or the compensation authority to ascertain what licences the respective owners were prepared to surrender in consideration of their renewal we should agree with this contention. It was stated by Sir Thomas Shann and

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all the other magistrates who took part in the proceedings that the decisions to renew the licence of the Egerton Inn and to decline to renew the licence of the Church Inn were considered and decided upon their merits, but if we had thought that the evidence was inadmissible we should not have been prepared to accept the view that the subsequent decision to disregard such offers and to decide the case upon the merits would get over the difficulty.

It seems to us, however, that, having regard to the provisions of the Act of 1904, the compensation authority were entitled to consider in deciding the question of renewal what, if any, licences the respective owners would be prepared to surrender, or what contribution would be made to the fund. This principle, we think, was in substance recognized both in this Court and the House of Lords in the *Leeds Case* (1), and while we adhere to the language I used in the judgment (2), namely, "that the fact that there had been a preliminary discussion and statement as to the terms upon which" the owners "would be willing to surrender . . . . licences was not sufficient to justify the objection and give effect to the objection that the magistrates could not report these houses to the compensation authority," we cannot assent to the argument that the mere reception of information as to such offers would of necessity vitiate the whole proceedings. For these reasons we think the rules should be discharged with costs.

Rules discharged.

Solicitors for Wilson's Brewery, Limited: *Chester, Broome & Co., for Foyster, Waddington & Foyster, Manchester.*

Solicitors for the justices: *Crowders, Vizard & Co., for Hockin, Beckton & Hockin, Manchester.*

(1) [1907] A. C. 420.

(2) Sub nom. *Rex* v. *Woodhouse*, (1906) 70 J. P. 485, at p. 486.

J. F. C.

[COURT OF CRIMINAL APPEAL.]

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THE KING *v.* SMITH.

THE KING *v.* WESTON.

Criminal Law—Habitual Criminal—Form of Indictment—Crime committed before Act in operation—Sentence of Penal Servitude and Preventive Detention—Appeal against Sentence without Leave—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 3 (*c*)—*Prevention of Crime Act*, 1908 (8 *Edw.* 7, *c.* 59), *ss.* 10, 11, 19.

By s. 10, sub-s. 1, of the Prevention of Crime Act, 1908, "where a person is convicted on indictment of a crime committed after the passing of this Act, and subsequently the offender admits that he is or is found by the jury to be a habitual criminal, and the Court passes a sentence of penal servitude, the Court . . . . may pass a further sentence ordering that on the determination of the sentence of penal servitude he be detained for such period not exceeding ten nor less than five years, as the Court may determine, and such detention is hereinafter referred to as preventive detention . . . . " By sub-s. 2, "a person shall not be found to be a habitual criminal unless the jury finds on evidence (*a*) that since attaining the age of sixteen years he has at least three times previously to the conviction of the crime charged in the said indictment been convicted of a crime . . . . and that he is leading persistently a dishonest or criminal life . . . . "

An indictment containing a count under the above section alleged that the prisoner, since attaining the age of sixteen years, had at least three times previously to the crime charged in the indictment been convicted of a crime within the meaning of the Act, and that he was leading persistently a dishonest and criminal life, but it did not allege that the prisoner was a habitual criminal:—

Held, that the count was sufficient, though from the point of view of pleading it would be better to insert an averment that the prisoner is a habitual criminal.

Held, also, that the words in s. 10, sub-s. 1, "crime committed after the passing of this Act," must be read in their natural sense, and that therefore the section applies in the case of a crime committed after the passing of the Act and before it came into operation, where the conviction takes place after the Act came into operation.

By s. 3 (*c*) of the Criminal Appeal Act, 1907, a person convicted on indictment may, with the leave of the Court of Criminal Appeal, appeal to the Court against the sentence, unless the sentence is one fixed by law. By s. 11 of the Prevention of Crime Act, 1908, "a person sentenced to preventive detention may, notwithstanding anything in the Criminal Appeal Act, 1907, appeal against the sentence without the leave of the Court of Criminal Appeal."

The Court, without deciding whether "the sentence" in s. 11 of the

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Prevention of Crime Act, 1908, includes the sentence of penal servitude as well as the sentence of preventive detention, said that they would adopt the practice that a prisoner, who appeals against the sentence of preventive detention, will be considered as having leave to appeal against the sentence of penal servitude, without the necessity of applying for leave.

APPEAL in each case to the Court of Criminal Appeal against the sentence of preventive detention under the Prevention of Crime Act, 1908, and application for leave to appeal against the sentence of penal servitude.

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The appellant was indicted at the quarter sessions for the borough of Croydon for breaking and entering a dwelling-house on July 13, 1909, and stealing therein certain articles, and the indictment also contained a second count alleging that the appellant, since attaining the age of sixteen years, had at least three times previously to the crime charged in the bill of indictment been convicted of a crime within the meaning of the Prevention of Crime Act, 1908 (1), and that he was leading

(1) 8 Edw. 7, c. 59, s. 10:

"(1.) Where a person is convicted on indictment of a crime, committed after the passing of this Act, and subsequently the offender admits that he is or is found by the jury to be a habitual criminal, and the Court passes a sentence of penal servitude, the Court, if of opinion that by reason of his criminal habits and mode of life it is expedient for the protection of the public that the offender should be kept in detention for a lengthened period of years, may pass a further sentence ordering that on the determination of the sentence of penal servitude he be detained for such period not exceeding ten nor less than five years, as the Court may determine, and such detention is hereinafter referred to as preventive detention, and a person on whom such a sentence is passed shall, whilst undergoing both the sentence of penal servitude and the sentence of preventive detention, be deemed for the purposes of the Forfeiture Act, 1870, and for all other purposes, to be a person convicted of felony.

"(2.) A person shall not be found to be a habitual criminal unless the jury finds on evidence—

"(*a*) that since attaining the age of sixteen years he has at least three times previously to the conviction of the crime charged in the said indictment been convicted of a crime, whether any such previous conviction was before or after the passing of this Act, and that he is leading persistently a dishonest or criminal life; or

"(*b*) that he has on such a

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persistently a dishonest and criminal life. There was no averment in the latter count that the appellant was a habitual criminal. The appellant on October 7, 1909, pleaded guilty to both counts and was sentenced to a term of five years' penal servitude, and then to be detained for the period of seven years, commencing immediately after the determination of the term of penal servitude, in pursuance of the provisions of the Prevention of Crime Act, 1908. The Act was passed on December 21, 1908, and came into operation on August 1, 1909. The crime of which the appellant was convicted was committed on July 13, 1909.

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In this case the appellant was convicted at the quarter sessions for the borough of Folkestone on September 27, 1909, on an indictment of larceny, and was sentenced to three years' penal servitude and to five years' preventive detention as a habitual criminal under the provisions of the above-mentioned Act. The crime of which the appellant was convicted was committed after

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previous conviction been found to be a habitual criminal and sentenced to preventive detention.

"(3.) In any indictment under this section it shall be sufficient, after charging the crime, to state that the offender is a habitual criminal.

"(4.) In the proceedings on the indictment the offender shall in the first instance be arraigned on so much only of the indictment as charges the crime, and if on arraignment he pleads guilty or is found guilty by the jury, the jury shall, unless he pleads guilty to being a habitual criminal, be charged to inquire whether he is a habitual criminal, and in that case it shall not be necessary to swear the jury again:

"Provided that a charge of being a habitual criminal shall not be inserted in an indictment—

"(*a*) without the consent of the Director of Public Prosecutions; and

"(*b*) unless not less than seven days' notice has been given to the proper officer of the Court by which the offender is to be tried, and to the offender, that it is intended to insert such a charge;

and the notice to the offender shall specify the previous convictions and the other grounds upon which it is intended to found the charge."

Sect. 11: "A person sentenced to preventive detention may, notwithstanding anything in the Criminal Appeal Act, 1907, appeal against the sentence without the leave of the Court of Criminal Appeal."

Sect. 19, sub-s. 2: "This Act shall come into operation on the first day of August, 1909."

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the passing of the Act and before it came into operation. In this case the count of the indictment under the Prevention of Crime Act, 1908, contained an averment that the appellant was a habitual criminal.

F. O. Robinson, for the appellant in *The King* v. *Smith*. Though the appellant is applying for leave to appeal against the sentence of five years' penal servitude under s. 3 (*c*) of the Criminal Appeal Act, 1907, no leave is necessary to enable the appellant to appeal against the sentence. A person sentenced to preventive detention under s. 10 of the Prevention of Crime Act, 1908, may, by s. 11, appeal against the sentence without leave. The words "the sentence" in s. 11 mean the whole sentence of penal servitude and preventive detention. Sect. 10 makes it a condition precedent to the power to impose preventive detention that the prisoner should first be sentenced to a term of penal servitude. There is only one sentence imposing two periods of detention. Sect. 10 speaks of the "further sentence" of preventive detention, and s. 13 directs that "the sentence of preventive detention" shall take effect immediately on the determination of "the sentence of penal servitude," but that is necessary to distinguish the two parts of the one sentence and does not shew that there are two distinct sentences. Indeed it strengthens the view contended for, because it shews that when the Act differentiates between the two parts of the sentence it does so in clear language. There being only one sentence, s. 11 gives an appeal as of right against the whole of that sentence, and no leave to appeal is necessary under s. 3 (*c*) of the Criminal Appeal Act, 1907. Further, there being no power to pass a sentence of preventive detention unless the prisoner is first sentenced to penal servitude, it is important that this Court should have the whole sentence before it in every appeal against the sentence of preventive detention, in order to see if the sentence of penal servitude is justified. If leave to appeal is necessary, application is now made for leave.

Hon. J. W. Mansfield (*G. M. Gathorne-Hardy* with him), for the appellant in *The King* v. *Weston*, adopted the same arguments.

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W. B. Campbell for the prosecution in the first case, and *T. Mathew* for the prosecution in the second case.

The judgment of the COURT (Lord Alverstone C.J., Darling and Bucknill JJ.) was delivered by

LORD ALVERSTONE C.J. This is an application in each of two cases for leave to appeal against a sentence of penal servitude, and there is also an appeal in each case against the sentence of preventive detention. The first point taken is that no leave is necessary to enable the respective appellants to appeal against the sentence of penal servitude. The contention is that the words "the sentence" in s. 11 of the Prevention of Crime Act, 1908, include the sentence of penal servitude as well as the sentence of preventive detention. The fact that a sentence of preventive detention can only be passed when a sentence of penal servitude is first imposed may well be relied upon in support of the appellants' contention. The point is not a clear one, but it seems to us that prima facie the words "the sentence" in s. 11 refer to the sentence of preventive detention and do not include the sentence of penal servitude. But however that may be, we are all satisfied that it would be a very inconvenient practice if an appeal lay as of right against the sentence of preventive detention, and if at the same time it were necessary to obtain leave to appeal against the sentence of penal servitude to which the sentence of preventive detention is attached. We shall therefore adopt the practice of allowing a prisoner who appeals against the sentence of preventive detention to appeal also against the sentence of penal servitude without asking for leave to appeal; that is to say, when a prisoner appeals as of right against the sentence of preventive detention, he will be considered as having leave to appeal against the sentence of penal servitude. We express no final opinion upon the meaning of s. 11, but we shall direct the registrar of the Court to treat every appeal against the sentence in such a case in that way. Any other practice would involve inconvenience and unnecessary expense.

F. O. Robinson, for the appellant Smith. The Court of quarter sessions had no power to pass a sentence of preventive detention

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under the Prevention of Crime Act, 1908. The crime of which the appellant was convicted was committed on July 13, 1909, after the passing but before the coming into operation of the Act. Sect. 10 provides that "where a person is convicted on indictment of a crime committed after the passing of this Act, and subsequently the offender admits that he is or is found by the jury to be a habitual criminal, and the Court passes a sentence of penal servitude, the Court . . . . may pass a further sentence" of preventive detention. The Act was passed on December 21, 1908, and by s. 19 it came into operation on August 1, 1909. The words in s. 10, "after the passing of this Act," must be read as meaning after the coming into operation of the Act. The Court cannot pass a sentence of preventive detention until after the Act has come into operation, and therefore the whole section must be read as only applying after the Act has come into operation. Otherwise the Act would come into operation at different dates in respect of matters provided for in the same section. If this is not the right construction of the section, the power of the Court to inflict a sentence of preventive detention in the case of a prisoner convicted of a crime committed before the Act came into operation would depend upon the accident of the date when the trial takes place. If for any cause the trial were postponed until after July 31, 1909, the Court would have jurisdiction to impose a sentence of preventive detention. It cannot have been intended that the jurisdiction of the Court should depend upon such an accidental circumstance as that. The Courts never construe Acts as retrospective unless they relate to procedure only, or the language compels the Courts to adopt such a construction. This is not a matter of procedure, nor does the language compel the Court to give a retrospective operation to the section. The Act only applies to a crime committed after it has come into operation. Before the Acts of Parliament (Commencement) Act, 1793 (33 Geo. 3, c. 13), an Act of Parliament, when no date was fixed for its commencement, was deemed to commence from the first day of the session in which it was passed. By the Act of 1793 the date of the Royal assent must be indorsed on each Act of Parliament, and such

indorsement is taken to be the date of its commencement where no other commencement is therein provided. By s. 36, sub-s. 1, of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), "in every Act passed either before or after the commencement of this Act the expression 'commencement,' when used with reference to an Act, shall mean the time at which the Act comes into operation." Therefore "the passing of this Act" in s. 10 of the Prevention of Crime Act, 1908, may well mean the commencement—that is, the coming into operation—of the Act.

Hon. J. W. Mansfield, for the appellant Weston. In *Wood* v. *Riley* (1) the Court of Common Pleas held that the words "any action commenced after the passing of this Act" in s. 5 of the County Courts Act, 1867 (30 & 31 Vict. c. 142), must be construed as meaning the date fixed for the Act to come into operation. This not being a matter of procedure, s. 10 must clearly indicate an intention on the part of the Legislature that the section should be retrospective, and no such intention is shewn here. This rule of construction is especially applicable where the liberty of the subject is concerned. [He also referred to *Hough* v. *Windus*. (2)]

W. B. Campbell, for the prosecution in Smith's case. It is not necessary that any retrospective operation should be given to s. 10 of the Act of 1908. The Act was passed when the crime was committed. For certain administrative purposes the coming into operation of the Act was postponed for several months, and there is no hardship or injustice in saying that the Act applies where the crime is committed after it is passed, when its provisions are deemed to be known to every one. The decision of the Court of Appeal in *Ex parte Rashleigh, In re Dalzell* (3) is conclusive of this case. In that case it was held that the words "the passing of the Bankruptcy Act, 1861," meant the time when the Act received the Royal assent, and not the time when it came into operation, and that therefore a non-trader might be adjudicated bankrupt in respect of a debt contracted after the Act was passed but before it came into operation. In *Wood* v. *Riley* (1) the question was as to costs and the matter was one of procedure only. The words in s. 10 of the

(1) (1867) L. R. 3 C. P. 26. (2) (1884) 12 Q. B. D. 224.
(3) (1875) 2 Ch. D. 9.

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Act of 1908, "after the passing of this Act," ought to receive their natural meaning, inasmuch as no manifest injustice or absurdity will result therefrom.

T. Mathew, for the prosecution in Weston's case.

Hon. J. W. Mansfield, in reply. The case of *Ex parte Rashleigh, In re Dalzell* (1) dealt with remedial legislation, namely, a Bankruptcy Act, and not, as in the present case, with the liberty of the subject.

The judgment of the COURT was delivered by

LORD ALVERSTONE C.J. In both these cases the crime was committed after the date of the passing of the Act and before it came into operation, and the prisoners were convicted after the Act came into operation. It is said that we ought not to construe the words of s. 10 of the Prevention of Crime Act, 1908, "a crime committed after the passing of this Act," so as to include a crime committed before the Act came into operation, but that we ought to treat only those crimes which were committed after the Act came into operation as coming within the scope of the section. In other words, we are invited to give to the above words of s. 10 a meaning which is not their natural meaning. It seems to us that we ought not to give effect to that contention. At one time there was no date inserted in any Act of Parliament as the date of its receiving the Royal assent, and each Act was deemed to come into operation as from the first day of the session in which it was passed, unless some specific date was mentioned therein for its commencement. That was found to create injustice and it was altered by the Acts of Parliament (Commencement) Act, 1793, which provides that the date when each Act is passed and receives the Royal assent is to be indorsed thereon, and that is to be the date of its commencement where no other commencement is provided therein. At the present time there are two well-known dates in many Acts of Parliament, the date of the Act passing and the date of its coming into operation. If, therefore, an Act is silent as to the date of its coming into operation, it comes into operation at the date of its passing. It is only necessary to look at this Act to see that many things were

(1) 2 Ch. D. 9.

required to be done before the Act could come into operation, such as instructions to governors of prisons as to the detention of persons sentenced to preventive detention, and instructions to magistrates. Accordingly s. 19 provides that the Act is to come into operation on August 1, 1909. It is said that, because of this necessity of postponing the date of the Act coming into operation, we ought to read the words "after the passing of this Act" in s. 10 in their non-natural meaning. In order to justify our doing so we must find some necessary implication to that effect in the Act itself, or the nature of the Act must be such as to compel us to come to that conclusion. This Act is a piece of remedial legislation passed not only for the protection of the public, but in the interest of prisoners themselves. It is in the interest of prisoners that the section should receive its ordinary meaning. If the Act had not been passed it is impossible to say what sentence might not have been passed upon the appellants; their sentences of penal servitude might have been made more severe. We must therefore construe the words "crime committed after the passing of this Act" in s. 10 in their natural meaning. With regard to the case of *Wood* v. *Riley* (1), however applicable the decision in that case may have been to the Act then before the Court, as to which it is not necessary to express any opinion, we are not prepared to apply it to this Act. The judgments in the case of *Ex parte Rashleigh, In re Dalzell* (2), which was decided eight years later by the Court of Appeal, consisting of James, Mellish, and Baggallay L.JJ. and Brett J., and in which it was held that the words "the date of the passing of the Bankruptcy Act, 1861," were to be read in their natural sense, and not as meaning the commencement of the Act, afford us the strongest authority for the construction which we are placing upon the Act now before us. The conclusion we have come to is that when the Act has once come into operation s. 10 can be applied in the case of a crime committed at any time after the passing of the Act. The point therefore fails.

F. O. Robinson, for the appellant Smith. This conviction cannot stand because the count under the Prevention of Crime

(1) L. R. 3 C. P. 26. (2) 2 Ch. D. 9.

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Act, 1908, is bad in form. Before a person can be sentenced to a term of preventive detention he must either admit that he is, or he must be found by a jury to be, "a habitual criminal." The indictment must therefore allege that the prisoner is a habitual criminal, otherwise it is bad. The indictment in the present case nowhere alleges that the appellant was or is a habitual criminal; it merely alleges that since attaining the age of sixteen years he has at least three times previously to the crime charged in the indictment been convicted of a crime within the meaning of the Prevention of Crime Act, 1908, and that he is leading persistently a dishonest and criminal life. It is true that by s. 10, sub-s. 2, of the Act a person shall not be found to be a habitual criminal unless the jury finds on evidence that since attaining the age of sixteen years he has at least three times previously to the conviction of the crime charged in the indictment been convicted of a crime, and that he is leading persistently a dishonest or criminal life. But it is one thing to say that a person cannot be found to be a habitual criminal except under certain conditions, and another thing to say that under those conditions he must be found to be a habitual criminal. The Act says the former but does not say the latter. Sect. 10, sub-s. 1, speaks of the offender admitting that he is or being found by a jury to be "a habitual criminal"; it does not speak of his being found since attaining the age of sixteen to have been three times convicted of a crime, &c. Similarly s. 10, sub-s. 2, draws a distinction between a habitual criminal and one who since the age of sixteen has been so convicted. By s. 10, sub-s. 4, the jury are to be charged to inquire, not whether since the age of sixteen the prisoner has been three times convicted, but whether he is a habitual criminal. It is quite possible that in a particular case a jury might find all the facts alleged in this count, and yet that, if asked whether in their opinion the prisoner was a habitual criminal, they might say that he had not as yet deserved that title.

By sub-s. 3 it is sufficient in any indictment under s. 10 to state that the offender is a habitual criminal; that is to say, it is not necessary that all the previous convictions intended to be relied on should be set out in the indictment. When the Act

says that it shall be sufficient to state that the offender is a habitual criminal it means that so much at least must be stated. The Legislature has taken the necessary steps to ensure that the offender shall have notice of the previous convictions to be laid to his charge by providing in s. 10, sub-s. 4, that a charge of being a habitual criminal shall not be inserted in an indictment unless not less than seven days' notice has been given to the offender that it is intended to insert the charge, and by prescribing that the notice shall specify the previous convictions and other grounds on which it is intended to found the charge.

W. B. Campbell, for the prosecution. The indictment is sufficient. No definition of habitual criminal is given except that in s. 10, sub-s. 2, and that is the definition. An indictment is equally good whether it follows the words of the definition or uses the term defined. This indictment follows the wording of the definition.

[He was stopped.]

F. O. Robinson in reply.

The judgment of the COURT was delivered by

LORD ALVERSTONE C.J. We think that there is no valid objection to the form of the indictment in this case for the reason given by Mr. Campbell, namely, that s. 10, sub-s. 2, of the Act gives the test of what is a habitual criminal. Still from the point of view of pleading it is better that the indictment should contain an averment in terms that the offender is a habitual criminal. It is of course right that the offender should have notice of what he is being charged with, and s. 10, sub-s. 4, provides that he shall have notice of the previous convictions and the other grounds upon which it is intended to found the charge of being a habitual criminal. As to the charge itself, it is better, as I have said, that it should appear in the indictment.

Upon the merits the Court reduced the sentence of penal servitude in Smith's case to three years and affirmed the

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sentence of seven years' preventive detention; and dismissed the appeal in Weston's case.

Solicitor for prosecution in both cases: *Director of Public Prosecutions.*

Solicitor for appellants: *Registrar of Court of Criminal Appeal.*

W. F. B.

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[COURT OF CRIMINAL APPEAL.]

THE KING *v.* COSTELLO AND BISHOP.

Criminal Law—Servant's Character—Giving False Character—Character not in Writing—Conspiracy—Servants' Characters Act, 1792 (32 *Geo.* 3, *c.* 56), *ss.* 2, 3.

By s. 2 of the Servants' Characters Act, 1792, "if any person or persons shall knowingly and wilfully pretend or falsely assert in writing that any servant has been hired or retained for any period of time whatsoever, or in any station or capacity whatsoever, other than that for which or in which he, she, or they shall have hired or retained such servant in his, her, or their service or employment," such person or persons shall be liable to a penalty. By s. 3, "if any person or persons shall knowingly and wilfully pretend or falsely assert in writing" that any servant was discharged or left his service at any other time than that at which he was discharged or actually left such service, such person or persons shall be liable to a penalty:—

Held, that the words "in writing" in the above sections only qualify the word "assert," and do not apply to the words "knowingly and wilfully pretend," and that therefore the false pretence as to character may be made orally or by conduct and need not be in writing.

APPEAL to the Court of Criminal Appeal against a conviction and sentence.

The appellant James Costello was indicted with one Mrs. Elizabeth Bishop at the Central Criminal Court in the first count of the indictment for conspiring together that Bishop should from time to time give false characters to the appellant Costello whenever Costello should offer himself as a servant to divers licensed victuallers; in the second count for conspiring together that Bishop should knowingly and wilfully pretend to divers licensed victuallers that Costello had

been hired as a servant to her for certain periods of time other than the periods of time during which she did hire him; in the third count for conspiring together that Bishop should knowingly and wilfully pretend to divers licensed victuallers that Costello had left her service at another time than that at which he actually left the same. Each of the above counts contained an allegation that the conspiracy was "so in manner and form aforesaid to contravene and set at nought the provisions of the Servants' Characters Act, 1792." (1) In the fourth count

(1) 32 Geo. 3, c. 56 ("An Act for preventing the Counterfeiting of Certificates of the Characters of Servants"): "Whereas many false and counterfeit characters of servants have either been given personally or in writing by evil disposed persons being or pretending to be the master, mistress, retainer, or superintendant of such servants, or by persons who have actually retained such servants in their respective service, contrary to truth and justice and to the peace and security of His Majesty's subjects; and whereas the evil herein complained of is not only difficult to be guarded against, but is also of great magnitude and continually increasing, and no sufficient remedy has hitherto been applied; Be it therefore enacted . . . . that . . . . if any person or persons shall falsely personate any master or mistress, or the executor, administrator, wife, relation, housekeeper, steward, agent, or servant of any such master or mistress, and shall either personally or in writing give any false, forged, or counterfeited character to any person offering him or herself to be hired as a servant into the service of any person or persons, then and in such case every such person or persons so offending shall forfeit and undergo the penalty or punishment hereinafter mentioned and in that behalf provided."

Sect. 2: ". . . . If any person or persons shall knowingly and wilfully pretend or falsely assert in writing that any servant has been hired or retained for any period of time whatsoever, or in any station or capacity whatsoever, other than that for which or in which he, she, or they shall have hired or retained such servant in his, her, or their service or employment, or for the service of any other person or persons, that then and in either of the said cases such person or persons so offending as aforesaid shall forfeit and undergo the penalty or punishment hereinafter mentioned and in that behalf provided."

Sect. 3: ". . . . If any person or persons shall knowingly and wilfully pretend or falsely assert in writing that any servant was discharged or left his, her, or their service at any other time than that at which he or she was discharged or actually left such service, or that any such servant had not been hired or employed in any previous service, contrary to truth, that then and in either of the said cases such person or persons shall forfeit and undergo the penalty or punishment hereinafter mentioned and in that behalf provided."

Sect. 4: ". . . . If any person shall offer himself or herself as a servant asserting or pretending that he or

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the appellant and Bishop were indicted for conspiring together to induce one Tibbitts, a licensed victualler, to take Costello into his employment by knowingly and wilfully falsely pretending that Costello had been in the service of Bishop for eleven months, that he was sober, honest, and industrious, and that Bishop was then in a position to vouch for his good character; in the fifth count for conspiring together that they should knowingly and wilfully falsely pretend to Tibbitts that Costello had been hired as a servant to Bishop for a period of time other than that during which she did hire him; and in the sixth count for conspiring together that they should knowingly and wilfully falsely pretend to Tibbitts that Costello had left her service at another time than that at which he actually left her service. Each of these last three counts alleged that the offence charged was in contravention of the Servants' Characters Act, 1792. In nine other counts they were charged with similar offences to those contained in counts 4, 5, and 6, with regard to three other specified licensed victuallers.

At the trial before the recorder the evidence was to the effect that Costello had been in Bishop's employment, but not for the period stated when the character was given, and that the characters given by Bishop to the licensed victuallers were given orally and not in writing. They were both found guilty.

Costello was also indicted in a separate indictment with one Connolly for conspiring together to cheat and defraud a certain person of his moneys. This indictment was also tried before the recorder, and they were both found guilty.

Costello was sentenced on each of the two indictments to eighteen months' imprisonment with hard labour, the sentences

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she hath served in any service in which such servant shall not actually have served, or with a false, forged, or counterfeit certificate of his or her character, or shall in any wise add to or alter, efface, or erase any word, date, matter, or thing contained in or referred to in any certificate given to him or her by his or her last or former actual master or mistress . . . . " such person shall be liable to the penalty or punishment prescribed.

Sect. 5 makes it an offence for a person who has been in service to " falsely and wilfully pretend " not to have been hired or retained in any previous service as a servant.

Sect. 6 provides for a penalty upon conviction of any of the above-mentioned offences and for imprisonment in default of payment.

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to run concurrently, and Bishop was bound over in her own recognizance in the sum of 50*l.* to come up for judgment if called upon. Costello and Connolly appealed to the Court of Criminal Appeal against their conviction upon the indictment for conspiracy to cheat and defraud, and the Court quashed the conviction upon the ground that there was no evidence to support the charge of conspiracy. It is not necessary for the purposes of this report to refer further to that appeal.

Costello also appealed against the conviction and sentence upon the indictment for conspiracy with Bishop.

F. Watt, for the appellant. The indictment was framed under ss. 2 and 3 of the Servants' Characters Act, 1792. Those sections only apply where the false character is given in writing. The words "in writing" in those sections apply to the words "knowingly and wilfully pretend" as well as to the words "falsely assert." Sect. 1 makes it an offence for a person to falsely personate a master or mistress, and "either personally or in writing" to give a false character to any person offering himself as a servant. That section clearly covers an oral as well as a written character. Again, s. 4 makes it an offence for a person to offer himself as a servant, "asserting or pretending that he or she hath served in any service in which such servant shall not actually have served, or with a false, forged, or counterfeit certificate of his or her character." The words "in writing" are there omitted. Therefore where it was intended that a verbal pretence should be sufficient the Act clearly says so. The true construction of ss. 2 and 3 is that the false character given must be in writing. There was no evidence here that Bishop gave any character in writing, and no offence against the Act was proved. There was therefore no evidence of a conspiracy to commit an offence against the Act. Next, there is no power to impose a sentence of hard labour upon this indictment. This is now important because the conviction upon the indictment for conspiracy with Connolly to cheat and defraud, under which a sentence of hard labour could be imposed, has been quashed. At common law a conspiracy to commit an offence against a statute is a misdemeanour which can only be punished by

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imprisonment without hard labour. The Servants' Characters Act, 1792, contains no provision authorizing a sentence of imprisonment with hard labour to be imposed for a conspiracy to commit an offence against the Act, though a conspiracy to cheat and defraud is, by s. 29 of the Criminal Procedure Act, 1851 (14 & 15 Vict. c. 100), punishable by imprisonment with hard labour. There is therefore no power to impose hard labour.

A. H. Bodkin, for the prosecution. Sects. 2 and 3 of the Servants' Characters Act, 1792, are not confined to a character given in writing. The preamble to the Act recites that "many false and counterfeit characters of servants have either been given personally or in writing," thus shewing that the general scope of the Act was intended to include characters given personally as well as in writing. In s. 1 the words used are "either personally or in writing give any false, forged, or counterfeited character." Sects. 2 and 3 create two offences—first, knowingly and wilfully pretending, and second, falsely asserting in writing. The words "in writing" only qualify the immediately preceding words "falsely assert" and do not apply to the words "knowingly and wilfully pretend." In s. 4 the words are "asserting or pretending," and in s. 5 "falsely and wilfully pretend." The word "pretend" where it occurs in the above sections has the same meaning as the words "false pretence" in s. 88 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), which latter enactment includes a case of false pretence by conduct, as, for instance, by wearing an undergraduate's cap and gown at a university town and obtaining goods from a tradesman under the false pretence that the person wearing the cap and gown is an undergraduate of the university. (1) The conviction was therefore right. It is admitted that there is no power to impose hard labour for a conspiracy to commit an offence against the Servants' Characters Act, 1792. The recorder probably acted inadvertently, because he was sentencing the appellant upon two indictments, upon one of which he was entitled to impose a sentence of hard labour, and he therefore passed the same sentence on both indictments, the sentences to run concurrently.

(1) *Rex* v. *Barnard*, (1837) 7 C. & P. 784.

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F. Watt, in reply. The preamble of the Act is satisfied by the provisions of ss. 1, 4, and 5, but it cannot affect the plain meaning of ss. 2 and 3.

The judgment of the COURT (Lord Alverstone C.J., Darling and Bucknill JJ.) was delivered by

DARLING J. The appellant Costello was indicted for conspiring with Mrs. Bishop to commit certain offences against the Servants' Characters Act, 1792. It is clear that they did conspire together that Bishop should give a false character as to the period of time during which Costello had been in her service and as to the time at which he left her service. They were both convicted. Costello had in fact been in her service, but not for the period stated in the character given by Bishop. The point taken on behalf of Costello is that there is no contravention of ss. 2 and 3 of the Act unless the character is given in writing, and that, as Bishop did not give any false character in writing, there was no evidence of a conspiracy to commit the offence against the Act charged. In order to see if that contention is sound it is necessary to examine the Act carefully. The preamble of the Act is important. It states that "whereas many false and counterfeit characters of servants have either been given personally or in writing by evil disposed persons being or pretending to be the master, mistress, retainer, or superintendant of such servants." The words there are "personally or in writing," and those words indicate what is the object and intention of the Act. To see how far that object and that intention have been carried out we must look at the enacting parts of the Act. Sect. 1 provides that if any person shall falsely personate any master or mistress, "and shall either personally or in writing give any false, forged, or counterfeited character to any person offering him or herself to be hired as a servant into the service of any person or persons," the person so offending shall be liable to a penalty. That section uses the words "personally or in writing." Sect. 2 provides that "if any person or persons shall knowingly and wilfully pretend or falsely assert in writing that any servant has been hired or retained for any period of time whatsoever, or in any station or capacity whatsoever, other than that for which or

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in which he, she, or they shall have hired or retained such servant in his, her, or their service or employment, or for the service of any other person or persons," such person or persons so offending shall be liable to a penalty. Sect. 3 provides that "if any person or persons shall knowingly and wilfully pretend or falsely assert in writing that any servant was discharged or left his, her, or their service at any other time than that at which he or she was discharged or actually left such service, or that any such servant had not been hired or employed in any previous service, contrary to truth," such person or persons shall be liable to a penalty. Sect. 4 deals with the case of a person offering himself or herself as a servant, "asserting or pretending that he or she hath served in any service in which such servant shall not actually have served, or with a false, forged, or counterfeit certificate of his or her character," or with an altered certificate. It seems to us, having regard to the preamble of the Act and the wording of these sections, that the Act, in ss. 2 and 3, intended to create two separate sets of offences, the first that of knowingly and wilfully pretending and the second that of falsely asserting in writing the various matters specified in those sections. In our opinion there may be a false pretence within the meaning of those sections either by word of mouth or by conduct, as, for instance, if regard be had to s. 4, by an applicant for a place dressing up in the well-known livery of a person of position, that is to say, by conduct somewhat analogous to that of the person at a university town, who is not a member of the university, dressing up in an undergraduate's cap and gown and thereby obtaining goods by the false pretence that he is an undergraduate. Sects. 2 and 3 therefore created two separate and distinct offences. In the present case there was ample evidence that Costello and Bishop conspired together to make a false pretence as to character within the prohibition of the sections and thus to commit an offence against the Act. The conviction must therefore be affirmed.

With regard to the sentence, the appellant has been convicted of a common law misdemeanour, and there is no statutory provision, as there is in the case of a conspiracy to cheat and defraud, empowering the Court to pass a sentence of imprisonment

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with hard labour. Having regard to the fact that the sentence on Costello of eighteen months' imprisonment with hard labour was passed because he had also been convicted of a conspiracy with another man to cheat and defraud, and as we have quashed that conviction, the length of the sentence ought, in our opinion, to be reduced, and we accordingly reduce it to one of imprisonment for twelve months without hard labour.

Solicitor for prosecution: *Director of Public Prosecutions.*
Solicitor for appellant: *Registrar of Court of Criminal Appeal.*

W. F. B.

HARRISON *v.* HARRISON.

1909
Oct. 20, 25.

Contract—Husband and Wife—Agreement to pay Wife a Sum of Money in the event of his being guilty of Conduct entitling her to a Separation Order—Validity of Agreement.

The plaintiff was the defendant's wife. The defendant had been convicted of cruelty to the plaintiff, and a separation order had been made by justices. Upon the making of the order the plaintiff lived apart from her husband. He subsequently entreated her to return and live with him, which she agreed to do on the terms of a deed whereby he covenanted not to assault her or conduct himself in such a way as to entitle her to obtain a further separation order, and that if he committed a breach of that covenant he would pay her a sum of 150*l.*, and the plaintiff covenanted that on payment by him of the 150*l.* she would not demand or receive any weekly sum that might be ordered by justices to be paid to her under any further separation order that she might obtain. The plaintiff returned to live with the defendant, who again assaulted her, whereupon she obtained a further separation order from the justices. She then brought her action for the recovery of the 150*l.* due under the covenant:—

Held, that the covenant was not void as against public policy and that the plaintiff was entitled to recover.

TRIAL before Walton J. without a jury.

The action was to recover a sum of 150*l.* due under a covenant. The plaintiff, Martha Harrison, was the wife of the defendant, Robert Harrison, a farmer. The plaintiff had cause to complain on several occasions of the treatment of her by her husband

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during the eleven years of their married life, and had on more than one occasion taken police court proceedings against him in respect of such ill-treatment. On May 6, 1909, the justices of the borough of Rotherham convicted the defendant of an assault upon the plaintiff and made an order under the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), that she was no longer bound to cohabit with him, and ordered him to pay her a weekly sum of fifteen shillings for the maintenance of herself and child. The plaintiff then commenced to live apart from her husband, but he several times entreated her to return to cohabitation with him, which eventually she agreed to do upon the terms of a deed entered into between the parties on June 12. That deed, after reciting the above facts, witnessed that in consideration of the premises the defendant covenanted with the plaintiff as follows: (1.) "That on the return of the said Martha Harrison to cohabitation with him he the said Robert Harrison will treat her properly in all respects and in particular will not assault or threaten her or in any other way so conduct himself as to entitle the said Martha Harrison to obtain from the justices an order of separation from him." (2.) "That if the said Robert Harrison shall be convicted of an assault or be adjudged by the justices to have threatened his wife or if the justices shall make an order of separation between the parties on any ground whatsoever the said Robert Harrison shall thereupon pay to the said Martha Harrison the sum of 150*l*."

In consideration of the above covenants by the defendant the plaintiff covenanted that on payment by the defendant of the said sum of 150*l*. she would not demand or take any weekly sum ordered to be paid to her by the justices under any order of separation obtained by her thereafter. Upon the execution of the deed the plaintiff returned to live with the defendant. On June 17 he again assaulted her. She summoned him for the assault. The justices convicted him and made an order of separation, giving the plaintiff the custody of the child, and ordering the defendant to pay her personally the sum of fifteen shillings a week. The plaintiff refused to receive payment of the said weekly sum and brought this action to recover the 150*l*.

Sylvain Mayer, for the defendant. The deed was void as being against the policy of the law, for it was made in contemplation of a future separation of husband and wife: *Westmeath* v. *Salisbury* (1); *Cartwright* v. *Cartwright* (2); *H.* v. *W.* (3); *In re Moore.* (4)

Secondly, the intention of the parties was that the 150*l.* should be in lieu of any weekly payments which the justices might order, and that the husband's obligation to pay the former should be dependent upon the wife's renunciation of the weekly payments being binding on her. But the wife's covenant was not binding. By s. 9 of the Summary Jurisdiction (Married Women) Act, 1895, "The payment of any sum of money directed to be paid by an order under this Act may be enforced in the same manner as the payment of money is enforced under an order of affiliation." And it has been held that where the mother of a bastard child had obtained an affiliation order an agreement by her to release the putative father from all actions, suits, and proceedings in respect of the child in consideration of the payment of a lump sum of money was no bar to an application by her to the justices to enforce payment of weekly sums under the order: *Griffith* v. *Evans* (5); *Follit* v. *Koetzow.* (6)

Ralph Bankes, for the plaintiff. Agreements made in contemplation of future separation are not now regarded as contrary to the policy of the law. Lindley L.J. in *McGregor* v. *McGregor* (7) said: "The law on the subject of such agreements has unquestionably gone through considerable modification during the last twenty or thirty years. There was a time when an agreement for a separation between husband and wife was considered contrary to public policy. That opinion was rendered untenable by the decision of the House of Lords in *Wilson* v. *Wilson* (8), and since that decision it is clear that such an agreement cannot be said to be against public policy." But in any view of the matter the objection does not apply where the parties are already living apart, as they were here, at the time of the agreement. In all the cases cited on the other side the parties were living together

(1) (1831) 5 Bli. (N.S.) 339.
(2) (1853) 3 D. M. & G. 982.
(3) (1857) 3 K. & J. 382.
(4) (1888) 39 Ch. D. 116.
(5) (1882) 46 L. T. 417.
(6) (1860) 29 L. J. (M.C.) 128.
(7) (1888) 21 Q. B. D. 424, at p. 430.
(8) (1848) 1 H. L. C. 538.

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when the agreement was made. In *Vandergucht* v. *De Blaquiere* (1), where husband and wife, who were separated, entered into an agreement in writing providing for their living together again, and stipulating that in the event of a future separation the wife should receive the income of certain funds, Lord Cottenham entertained at least a doubt whether the agreement was not valid, upon the ground that it "was not entered into when the parties were living together, but was the price and condition of terminating a state of separation." The same view was taken by Lord Langdale in *Jodrell* v. *Jodrell*. (2) The question is what is the primary object of the deed? Here it was to bring the parties together again. A further answer to the defendant's objection to the validity of the agreement is that it does not contemplate a voluntary separation at all, but only a separation by the order of a Court, a matter which cannot be contrary to the policy of the law. Such cases as *Follit* v. *Koetzow* (3) do not shew that the agreement by the woman to accept a lump sum in lieu of weekly payments ordered by the justices is a nullity; they only shew that, instead of being a bar to the justices' jurisdiction, it is merely a matter for them to take into consideration upon the question whether the order should be made. If the plaintiff here in breach of her covenant took the weekly payments under the justices' order the defendant would have an action for damages against her in consequence of that breach.

Sylvain Mayer, in reply.

WALTON J. In this case the plaintiff sues the defendant for 150*l.* payable under a covenant in a deed dated June 12, 1909. The plaintiff is the wife of the defendant. The facts of the case, which are not in dispute and which are recited in the deed, are as follows. The defendant had been frequently guilty of ill-treating his wife, and on May 6, 1909, was convicted by justices of an assault upon her. The justices made an order that she should be at liberty to live separate from her husband and ordering him to pay her the weekly sum of fifteen shillings for the maintenance of herself and her child, and thereupon the

(1) (1839) 5 My. & Cr. 229. (2) (1845) 9 Beav. 45.
(3) 29 L. J. (M.C.) 128.

plaintiff lived separate from the defendant. Subsequently he pressed her to return and live with him, and she agreed to do so on his entering into the following covenants:—(1.) That on her returning to live with him he would treat her properly, and in particular would "not assault or threaten her or in any other way so conduct himself as to entitle the said Martha Harrison to obtain from the justices an order of separation from him"; (2.) that if he should "be convicted of an assault or be adjudged by the justices to have threatened his wife or if the justices" should "make an order of separation between the parties on any ground whatsoever" the defendant would pay her the sum of 150*l*. The deed also contained a covenant by the wife that in consideration of the defendant's covenants and on payment by him of the said sum of 150*l*. she would not demand or take any weekly sum ordered to be paid to her by the justices under any order of separation obtained by her thereafter. Upon the execution of the deed the plaintiff returned and lived with him, thereby giving up her rights under the separation order of May 6. But within a very short time he again ill-treated her, and on August 5 the justices made a further separation order, giving her the custody of the child, and ordering the defendant to pay to the plaintiff personally the weekly sum of fifteen shillings. The action was then brought on the husband's second covenant to recover the 150*l*. In order to determine whether the action can be maintained it is necessary first to ascertain what the covenant means. If it be construed literally the money would become payable upon conviction of the defendant of any kind of assault, however slight. But I do not think that can be its meaning. I think it must be read along with the first covenant and must be taken to mean that if the defendant is convicted of an assault or of threats of such a kind as to entitle the wife to obtain an order of separation from the justices, then in that event the money will become payable. By way of defence to the action the defendant contends that his covenants and the plaintiff's covenant are mutually dependent, and that the plaintiff's covenant is unenforceable against her, upon the ground that under s. 9 of the Act of 1895 the payment of the

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Walton J.

weekly sums which by her covenant she forgoes "may be enforced in the same manner as the payment of money is enforced under an order of affiliation," and that on an application to enforce the payment of weekly sums under an order of affiliation such a covenant would not operate as a bar to the enforcement. I am not by any means satisfied that s. 9 means that all the considerations which apply to the enforcement of a bastardy order apply to the enforcement of payment under this Act. I think that if the wife asked for an order for maintenance money it might be a good answer by the husband that he had covenanted to pay and had paid a larger sum in lieu of the weekly payments; at all events the fact of her covenant is a matter that the justices would take into consideration. I fail to see that the contention that the plaintiff's covenant is not binding on her is made out so as to afford any answer to the action. Secondly, the defendant contended that the covenant now sued upon was void as being a promise made in view of a possible future separation. Various cases were cited, from *Westmeath* v. *Salisbury* (1) downwards, shewing that as a general rule agreements which provide for a future separation between husband and wife are against the policy of the law and cannot be enforced. Speaking generally, I accept that proposition. But I cannot see how a separation under an order of justices can in any way be said to be against the policy of the law. Here the parties were living apart at the time the agreement was made, and its object was mainly to enable them to live together again, though it also provided for the maintenance of the wife in the event of their subsequently being again separated by an order of justices. If such a separation is not against the policy of the law I cannot see how the agreement can be so merely because it is made in contemplation of such a separation. I think the defence fails and that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

Solicitor for plaintiff: *J. C. Jackson, for W. M. Gichard, Rotherham.*

Solicitors for defendant: *H. Campion & Co., for H. Neal, Sheffield.*

(1) 5 Bli. (N.S.) 339.

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1909
Nov. 2.

LAGOS *v.* GRUNWALDT.

Practice—Writ — Special Indorsement — Liquidated Demand — Affidavit in support—"Any other person"—Foreign Litigant—Affidavit by Solicitor — Information and Belief—Order III., *r.* 6; *Order* XIV., *r.* 1.

The plaintiff, who had acted as the legal representative of the defendants during litigation in South America, sent in his bill of costs to their solicitors in England, and afterwards issued a specially indorsed writ against them, claiming 1469*l.* for professional charges and disbursements. An application for leave to sign judgment under Order XIV. was supported by an affidavit made by a member of the English firm of solicitors who represented the plaintiff. This affidavit was sworn in London, and the deponent stated that he was a member of the firm of solicitors acting for the plaintiff; that the defendants were justly and truly indebted to the plaintiff in the sum of 1469*l.* for professional charges; gave the history of the case; and added that it was within his own knowledge that the debt was incurred and was still owing, such knowledge being obtained from correspondence received from the plaintiff and from correspondence and conversations the deponent had had with the defendants' solicitors, and that he was duly authorized by the plaintiff to make the affidavit:—

Held, that there was a liquidated demand, but that the affidavit was irregular, inasmuch as the deponent was not a person who could swear positively to the facts and verify the cause of action and the amount claimed within Order XIV., r. 1, and his affidavit was only made on information and belief. The conditions imposed by the rule were not fulfilled, and the Court had no jurisdiction to make an order under Order XIV.

APPEAL from an order of Sutton J.

In 1896 Messrs. Liebes, Hirschel & Grunwaldt authorized Mr. R. Castronan to enter into an agreement on their behalf with Messrs. Beisso, Gandos & Avegno for the purchase of sealskins in Monte Video. Castronan exceeded his powers and signed a contract in terms to which he was not authorized to agree. Messrs. Liebes, Hirschel & Grunwaldt refused to comply with this contract, and Messrs. Beisso, Gandos & Avegno took proceedings against them in Monte Video for damages. In 1898 Messrs. Liebes, Hirschel & Grunwaldt gave a power of attorney to Dr. A. G. Lagos, a lawyer of Monte Video, authorizing him to defend this action on their behalf. Another

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attorney was shortly afterwards appointed, and Dr. Lagos continued the professional direction of the defence. After some years of litigation the proceedings were terminated by a judgment in May, 1907, in favour of Messrs. Liebes, Hirschel & Grunwaldt without costs. In the same year Dr. Lagos sent to Messrs. Pritchard, Englefield & Co., who acted as solicitors to Messrs. Liebes, Hirschel & Grunwaldt, and were now acting for Hirschel, his bill of costs, and on June 8, 1909, he issued a writ in an action against Grunwaldt and Hirschel, Liebes having died. This writ was specially indorsed under Rules of the Supreme Court, Order III., r. 6, and stated that the plaintiff's claim was "for professional charges for legal work done as attorney, and money paid by the plaintiff for the defendants at their request. Particulars: 1909, June 7. Bill of charges and disbursements forwarded to Messrs. Pritchard, Englefield & Co., the defendants' solicitors, on the 28th June, 1907, in an action of *Beisso, Gandos & Avegno* v. *Liebes, Hirschel & Grunwaldt*, full particulars of which have been delivered and exceed three folios.

		£1971 13 0
By cash on account	£500 0 0	
Costs repaid by Beisso, Gandos & Avegno	2 8 11	
		502 8 11
Amount claimed ...		£1469 4 1

"The plaintiff will also claim the above amount on accounts stated."

The action came on in the form of an application for judgment under Order XIV. and was supported by an affidavit made by a member of the English firm of solicitors who represented Dr. Lagos. This affidavit was sworn in London on June 28, 1909, and thereby the deponent stated as follows:

"1. The defendants are justly and truly indebted to the above-named plaintiff in the sum of 1469*l.* 4*s.* 1*d.* for professional charges for legal work done as attorney and money paid by the plaintiff for the defendants at their request between the 2nd March, 1898, and the 3rd May, 1907, under a joint power of attorney

dated the 24th January, 1898, executed by the above-named defendants together with one Herman Liebes (since deceased), and were so indebted at the commencement of this action. The particulars of the said claim appear by the indorsement on the writ of summons in this action.

"2. The above-named defendants together with the said Herman Liebes were defendants in an action brought by Messrs. Beisso, Gandos & Avegno in the Courts of Monte Video in which the said Beisso, Gandos & Avegno claimed the sum of 9000*l.* and costs for breach of a contract dated the 5th August, 1896.

"3. The above-named plaintiff was instructed in such proceedings by Messrs. Pritchard, Englefield & Co., of Little Trinity Lane, London, E.C., who are the solicitors for the above-named defendants, and I crave leave to refer to the bundle of correspondence which is produced to me at the time of my being sworn to this my affidavit marked with the letter 'A,' in which Messrs. Pritchard, Englefield & Co. agree that the plaintiff's claim is fair and reasonable and same should be paid by the defendants without further delay.

"4. I verily believe that there is no defence to this action.

"5. It is within my own knowledge that the said debt was incurred and is still due and owing, such knowledge being obtained from correspondence received from the plaintiff and also from correspondence and conversations I have had with Messrs. Pritchard, Englefield & Co. I am duly authorized by the plaintiff to make this affidavit."

On July 30, 1909, the Master made an order giving the defendants leave to defend on certain terms, including a direction that they should pay 400*l.* into Court within fourteen days, and Sutton J. on October 14, 1909, affirmed this order. The defendant Grunwaldt appealed and asked for unconditional leave to defend.

Simon, K.C., and *J. D. Crawford*, for the appellant. The claim in this action is not one which can be enforced by proceedings under Order XIV. There is no debt or liquidated demand which can authorize special indorsement of the writ

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under Order III., r. 6. Even if it does come within Order XIV. the proceedings are irregular, for the affidavit in support of the application was made by the London solicitor of the plaintiff, who is a foreigner resident abroad. All the litigation took place at Monte Video, and it is impossible to say that the deponent is a "person who can swear positively to the facts, verifying the cause of action, and the amount claimed" within Order XIV., r. 1.

[They were stopped by the Court.]

E. E. Wild (*M. Shearman, K.C.*, with him), for Dr. Lagos. This is a liquidated demand. The bill was sent to Messrs. Pritchard, Englefield & Co. and accepted by them, and 500*l.* has been paid on account. But apart from that a claim for reasonable remuneration not expressly fixed by contract may be specially indorsed as a debt or liquidated demand. It is the common practice with tradesmen's accounts: *Runnacles* v. *Mesquita* (1); Annual Practice, 1910, p. 15. The operation of Order III., r. 6, and Order XIV. is not confined to cases in which the old action of debt in its technical form would have been maintainable: Annual Practice, 1910, pp. 13, 14.

[FARWELL L.J. referred to Precedents of Pleadings by Bullen and Leake, 2nd ed., p. 28.]

This claim would formerly have been made by a quantum meruit count, which was superseded by the indebitatus count, and it is a liquidated demand.

Secondly, the affidavit is sufficient. The words "by any other person" did not occur in the original rule of 1875, and they were inserted expressly to cover such a case as the present: *Hallett* v. *Andrews*. (2) This affidavit is in the form prescribed by Form 23A of Appendix B, Part II., to Rules of the Supreme Court, 1883, and is perfectly regular.

[COZENS-HARDY M.R. The rule does not say that the affidavit can be made on information and belief.]

If the affidavit can only be made by the plaintiff himself, the alteration in the rule is useless. It is clear in this case that there is no defence, and that is all that the plaintiff has to shew: *Jacobs* v. *Booth's Distillery Co.* (3)

(1) (1876) 1 Q. B. D. 416. (2) (1897) 42 Sol. J. 68.
(3) (1901) 85 L. T. 262.

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COZENS-HARDY M.R. This appeal raises a question of importance, but not to my mind of real difficulty. It has been argued extremely well on behalf of the respondent by Mr. Wild, who said everything that could be urged for his client. The plaintiff lives in the Argentine Republic and is a solicitor. He says, and with truth, that he was instructed to defend certain proceedings pending in the Republic of Uruguay on behalf of the appellant Grunwaldt and the two other defendants, Hirschel and Liebes. The action seems to have lasted a long time, and in the result the defence succeeded in the Final Court, but without costs. The plaintiff sends over what he calls a statement of the costs paid by him on account of Grunwaldt in the action, bringing out a balance of 6705 dollars. It is not disputed that Grunwaldt, with whom alone we are concerned, did, through Messrs. Pritchard, Englefield & Co., instruct the plaintiff to defend this action. A considerable sum of money (500*l.*) was paid on account, details of which have not been furnished to us, but it has been stated, and the fact is in favour of Mr. Wild's client, that the whole or greater part of that 500*l.* was in fact found by Grunwaldt; so that the liability on contract between Grunwaldt and the plaintiff is not disputed. A writ was issued by Dr. Lagos, and he claims "for professional charges for legal work done as attorney, and money paid by the plaintiff for the defendants at their request. Particulars: Bill of charges and disbursements forwarded to Messrs. Pritchard, Englefield & Co., the defendants' solicitors, on the 28th June, 1907, in an action of *Beisso, Gandos & Avegno* v. *Liebes, Grunwaldt & Hirschel*, full particulars of which have been delivered and exceed three folios." And then he gives figures bringing out 1469*l.* odd as the amount claimed, "and the plaintiff will claim the above amount on accounts stated." Having served that writ and given notice of it in Paris, the plaintiff was minded to proceed under Order XIV. Now Order XIV. provides a special form of procedure in certain cases, but it is only in certain cases, and unless the regular conditions are fulfilled the Court has no jurisdiction to make an order under Order XIV. Under Order XIV. the first thing that has to be done is to have the writ specially indorsed under Order III., r. 6, and all that is required by Order III., r. 6, is

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that the plaintiff should be seeking to recover for a debt or liquidated demand of money. I think this is within the meaning of that rule. It is a liquidated demand for money, 1469*l.*, or something which could have been claimed under the old indebitatus count.

But that is not all. The plaintiff must not only satisfy the Court that there is a specially indorsed writ under Order III., r. 6, but he must do something else. He may "on affidavit" made by himself, "verifying the cause of action and swearing that in his belief there is no defence to the action," apply to a judge for liberty to enter final judgment. That was the original form of Order XIV., r. 1, and unless the plaintiff could make an affidavit verifying the cause of action, and swearing that in his belief there was no defence to the action, Order XIV. could not be used at all. Then it was pointed out that there were many cases in which the plaintiff might have a perfectly good claim to which there was no defence, but the plaintiff himself was not in a position to make an affidavit. Then the rule was altered to add these words: "or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed (if any), and stating that in his belief there is no defence to the action," and so on. Now here we have no affidavit by the plaintiff, but we have an affidavit by a member of the firm of solicitors who act here for the plaintiff in the action, in which he says, "The defendants are justly and truly indebted to the above-mentioned plaintiff in the sum of 1469*l.* 4*s.* 1*d.* for professional charges," following the words in the writ. "The particulars of the said claim appear by the indorsement on the writ of summons in this action." Then it states shortly the history of the action, and he refers to a bundle of correspondence which has passed between his firm and Pritchard, Englefield & Co. He says, "I verily believe that there is no defence to this action," and then, "It is within my own knowledge that the said debt was incurred and is still due and owing, such knowledge being obtained from correspondence received from the plaintiff and also from correspondence and conversations I have had with Messrs. Pritchard, Englefield & Co. I am duly authorized by the plaintiff to make

this affidavit." In my opinion it is impossible to say that this is an affidavit made by a person who can swear positively to the facts. It is obviously nothing more than a statement made on his information and belief, that information being derived from his own client, the plaintiff, who tells him this is due—and that obviously will not be enough to enable him to make the affidavit—and from further statements made by Pritchard, Englefield & Co., who, beyond all doubt, were not the solicitors for the defendant Grunwaldt at the time when those statements were made. Is it possible that the deponent can swear positively to the facts as to the stamped paper for forty-three documents, which is the first item in the bill which is given here? Is it possible that he can swear this sum was paid? I might go through all the items. Is it possible that he can swear that the fees charged by Dr. Lagos and another attorney, amounting to 1500*l.* in all, were due? It seems to me we should be giving an irrational and improper extension to Order XIV., r. 1, if we said that such an affidavit as that, made in aid of the plaintiff, was sufficient to bring his claim within the peculiar provisions of Order XIV. In my opinion on that ground there was no jurisdiction under Order XIV. to make the order which was made. We might as well say that the plaintiff's solicitor in every case could make an affidavit to satisfy Order XIV., and that would be dangerous beyond anything. There may be cases (I do not wish to be misunderstood on this point) in which the plaintiff's solicitor or the plaintiff's solicitor's clerk may be perfectly competent to make an affidavit satisfying the conditions of Order XIV., r. 1. There are no conditions here which justify us in saying that the plaintiff's solicitor could make the affidavit and swear positively to the facts, and swear positively verifying the amount claimed. In my opinion, on that short ground the learned judge and the Master had no jurisdiction to make the order that was made, and the appeal ought to be allowed, and the money which has been paid into Court paid out to the appellant.

FARWELL L.J. I am of the same opinion. Two preliminary objections are taken. The first is that Order III., r. 6, does not

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apply, because this is not a debt or liquidated demand arising under a contract. It is a claim on contract for quantum meruit. In my opinion that is within the rule. I think the words "debt or liquidated demand" point to the old division of common law actions to be found in Bullen and Leake, 2nd ed., p. 28. The old indebitatus counts "which have from time to time been rendered more and more concise are designated with little difference of meaning by the terms indebitatus counts, money counts or common counts; the expression common counts or common indebitatus counts being often used to designate those of most frequent recurrence, viz., where the debt is for goods sold and delivered, goods bargained and sold, work done, money lent, money paid, money received, interest, and upon accounts stated; and the expression money counts being sometimes used to particularize those for money lent, money paid, and money received. The most appropriate name seems to be indebitatus counts." And the learned authors go on to say, "there were also formerly in use counts known as quantum meruit and quantum valebat counts, which were adopted where there was no fixed price for work done or goods sold, &c. These counts, however, have fallen into disuse, and have been superseded by the general application of the indebitatus counts." In my opinion that is the true view; everything that could be sued for under those counts comes within the description of debt or liquidated demand.

The second objection, however, is, I think, fatal to the respondent's case. The rule provides that the affidavit may be made not only by the plaintiff, but by any other person who can swear positively to the facts, verifying the cause of action and amount claimed (if any). It is obvious on reading this affidavit that the deponent knows nothing whatever personally, and can only swear to the best of his information and belief. The procedure under Order XIV. is very special, and Order XXXVIII., r. 3, which regulates the contents of affidavits, provides that affidavits shall be "confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions," and so on. I find in *Vinall* v. *De Pass* (1) that garnishee proceedings have

(1) [1892] A. C. 90.

been allowed to be proved by an affidavit as to information and belief under Order XLV., r. 1, where the words are "Upon affidavit by himself or his solicitor stating that judgment has been recovered or the order made and that it is still unsatisfied, and to what amount." But when I contrast those words with the very special words in Order XIV., r. 1, "swear positively to the facts," and when I bear in mind the summary proceedings which are founded upon this order, it seems to me that it is most important that the admission of such affidavits by solicitors should not be allowed. A solicitor may be a perfectly good witness from his own knowledge of the facts, but the mere fact that he is the solicitor cannot make his information and belief any better than that of any other person. To say that the solicitor can take his client's instructions and then swear "positively" that they are true seems to me an extravagant proposition. I think on that ground that there was no jurisdiction to make this order.

Appeal allowed.

Solicitors: *Cohen & Cohen; Ince, Colt & Ince.*

H. C. R.

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Oct. 18.

THE KING *v.* HALKETT AND ANOTHER.

Justices—Practice—Institution of Prosecution—Consent in Writing of Chief Officer of Police—Absence of Chief Constable—Consent by Police Superintendent—Sunday Observance Act, 1677 (29 *Chas.* 2, *c.* 7)—*Sunday Observation Prosecution Act*, 1871 (34 *& 35 Vict. c.* 87), *ss.* 1 *and* 2 *and Schedule.*

By ss. 1 and 2 of and the schedule to the Sunday Observation Prosecution Act, 1871, no prosecution shall be instituted against any person for an offence committed by him under the Sunday Observance Act, 1677, except with the consent in writing of the chief officer of police of the police district in which the offence is committed, or of two justices or a stipendiary magistrate having jurisdiction in the place where the offence is committed; and the "chief officer of police" is defined as meaning in a county "the chief constable . . . . or other officer having the chief command of the police in the police district."

In the county and city of Kingston-upon-Hull a superintendent of police was in fact in chief command of the police in the police district during the temporary absence of the chief constable. He consented to the institution of a prosecution against a person for an offence alleged to have been committed by him under the Sunday Observance Act, 1677. At Kingston-upon-Hull there is no office of deputy chief constable:—

Held, that the superintendent of police had no power to give the consent, inasmuch as the Sunday Observation Prosecution Act, 1871, refers to the "chief officer of police" as a person designated by name, and the superintendent of police did not necessarily come within the definition of that expression contained in the Act.

RULE nisi calling upon the respondents J. G. H. Halkett, stipendiary magistrate for the city and county of Kingston-upon-Hull, and George Henry Chapman, superintendent of Kingston-upon-Hull city police, to shew cause why a writ of certiorari should not issue to remove into the High Court the record of conviction dated September 15, 1909, whereby the applicant Butnick was convicted for having on September 5, 1909, being the Lord's Day, unlawfully exercised certain worldly business in his ordinary calling of a tobacconist by selling cigarettes, the same not being a work of necessity or charity, contrary to the Sunday Observance Act, 1677, upon the ground (inter alia) that consent had not been given by the proper officer.

By the Sunday Observation Prosecution Act, 1871, s. 1, "No prosecution or other proceeding shall be instituted against any

person or the property of any person for any offence committed by him under " the Sunday Observance Act, 1677, " or for the recovery of any forfeiture or penalty for any such offence, except by or with the consent in writing of the chief officer of police of the police district in which the offence is committed, or with the consent in writing of two justices of the peace or a stipendiary magistrate having jurisdiction in the place where such offence is committed. No such prosecution shall be heard before the justices of the peace or stipendiary magistrate by whom or with whose consent the same has been instituted."

Sect. 2: " In this Act . . . . the term 'chief officer of police' means the officers mentioned in relation to each district in " the schedule to the Act.

" SCHEDULE.

Police district.	Chief officer of police.
The City of London and the liberties thereof, exclusive of Southwark.	The Commissioner of Police of the City.
The metropolitan police district.	The Commissioner of Police of the Metropolis.
Any county, any riding, parts, division, or liberty of county, any borough or town maintaining a separate police force.	The chief constable or head constable or other officer, by whatever name called, having the chief command of the police in the police district."

It appeared from the affidavits that on August 23, 1909, the chief constable left Kingston-upon-Hull for his annual holiday. On July 21, 1909, he brought before the watch committee an application for leave of absence, and the following is an extract from the proceedings of the watch committee of that date:—

" CHIEF CONSTABLE'S LEAVE OF ABSENCE.

" The chief constable asked for permission to take his ordinary relief during the recess, and suggested that Superintendent Chapman should be allowed to sign papers, and that any question of discipline should be referred to the chairman and deputy-chairman.

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"Resolved—That such permission be granted, and that the chief constable's suggestion be adopted."

In the Kingston-upon-Hull police force there were six superintendents of police, of whom the respondent Chapman was the senior. There was no such appointment as that of deputy chief constable. An affidavit made by the chief constable contained the statement that the respondent Chapman was the chief officer of police in Kingston-upon-Hull if he (the chief constable) was absent, whether on duty or on private affairs.

On September 8, 1908, the respondent Chapman completed the requisite service to entitle him to retire on a pension. His services were specially retained on the recommendation of the chief constable, and it was provided by a resolution of the watch committee passed on November 18, 1908, that he should not be posted to any division or to the detective department, but be employed to assist the chief constable in duties generally.

Since that date he had taken the chief constable's place whenever the chief constable had been absent, by virtue of being the next senior officer of the city police force.

He had occupied a specially confidential position with regard to the chief constable, and had by his orders prepared certain documents for his perusal and signature, amongst them being the books in which were entries of offences for which the chief constable was in the habit of applying to the police court for summonses in each week, which included those under the Sunday Observance Act, 1677. There were rubber stamps used in marking these applications and bearing the words "summons," "chief constable," and "consent." These had been in existence about a year and had been kept in the respondent Chapman's possession, and were locked up when not in use by him or the chief constable.

The chief constable stated in his affidavit that the resolution of the watch committee of July 21, 1909, gave to the respondent Chapman full administrative control of the Kingston-upon-Hull city police force while he (the chief constable) was away, and immediately he left Kingston-upon-Hull the respondent Chapman was in charge of the police force.

During the whole period of the chief constable's holiday the

respondent Chapman acted upon his own initiative, without any reference to the chief constable. He received from all divisions and departments the references which in ordinary course were submitted to the chief constable. He opened all letters arriving for the chief constable and signed all correspondence and documents which he would have signed.

On September 5, 1909, the following entry of the offence of the applicant was made in the information book at the central police station by the sergeant in charge :—

"POLICE REPORT AGAINST BY-LAWS, &c.

Date, 1909.	Name and address of person reported.	Report.	Magistrate before whom laid.
Sept. 5 ..	Lazarus Butnick, 35, Queen Street.	Selling cigarettes at 12.10 P.M. on Sunday, the 5th of September, 1909.—H. Rose P.C. 257.	

Summons.

G. H. Chapman, Superintendent,
For Chief Constable.

Consent. September 6, 1909."

On September 6 the respondent Chapman stamped and signed the book in the manner appearing from the above entry, one stamp bearing the word "summons," "chief constable," and the date, and the other stamp bearing the word "consent." These stamps were in his charge. "H. Rose P.C. 257" mentioned in the entry was the officer to whom the consent was given and who took all the necessary steps.

On September 15, 1909, a summons against Butnick for unlawfully exercising on September 5, 1909, certain worldly business in his ordinary calling of a tobacconist by selling cigarettes, the same not being a work of necessity or charity, contrary to the Sunday Observance Act, 1677, was heard by the respondent magistrate. Butnick's solicitor asked for the respondent Chapman's authority in writing from the chief constable to institute the proceedings and contended that the respondent Chapman was not the chief constable. Chapman submitted to the magistrate that although he was not chief constable he was

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during the chief constable's absence the chief officer of police of the district. The magistrate expressed himself satisfied that the respondent Chapman was de facto chief officer of police and convicted Butnick.

The rule nisi was then obtained at the instance of Butnick.

Danckwerts, K.C. (*E. Shortt* with him), shewed cause. The consent to the prosecution given by the respondent Chapman was "a consent in writing of the chief officer of police of the police district in which the offence is committed" within the meaning of s. 1 of the Sunday Observation Prosecution Act, 1871. Chapman was the senior superintendent of police of the district. He was therefore "the chief officer of police of the police district" during the time the chief constable was absent. The definition of "chief officer of police" contained in s. 2 and the schedule to the Act of 1871 shews that the officer who in fact has the chief command is the person by whom the consent to the prosecution must be given.

Tindal Atkinson, K.C., and *H. S. Q. Henriques*, in support of the rule. The object with which the Sunday Observation Prosecution Act, 1871, was passed was to prevent oppression in enforcing the Sunday Observance Act, 1677. The schedule to the Act of 1871 shews that in the county of Kingston-upon-Hull the chief constable and no one else is the chief officer of police. The respondent Chapman was not appointed deputy chief constable. The expression "chief constable" does not include a superintendent of police. The chief constable is the person designated by statute to give the consent, and it must be given by him and by no other officer of police. Sect. 1 of the Act of 1871 provides that, if necessary, the consent can be given by two justices of the peace or a stipendiary magistrate, and the fact that the section contains a further provision that a prosecution cannot be heard by the justices or stipendiary magistrate with whose consent it has been instituted shews that the Legislature contemplated that some judgment should be exercised before the consent is given.

LORD ALVERSTONE C.J. I am of opinion that the rule must be made absolute. By the Sunday Observation Prosecution Act,

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Lord Alverstone C.J.

1871, s. 1, persons are protected against oppressive prosecution for offences committed by them under the Sunday Observance Act, 1677, by the requirement that before the prosecution is instituted the consent in writing of the chief officer of police of the district, or of two justices of the peace or a stipendiary magistrate having jurisdiction in the place where the offence is committed, shall be obtained. By s. 2 and the schedule to the Act of 1871, in a county the chief officer of police means the chief constable or head constable or other officer, by whatever name called, having the chief command of the police in the police district. In considering the question whether that definition includes a person having in fact the chief command of the police temporarily, the existence of the power given by s. 1 of the Act of 1871 to obtain the consent from two justices or a stipendiary magistrate must not be overlooked. Sect. 2 and the schedule to the Act of 1871 jointly provide that the term "chief officer of police" means in relation to the city of London the Commissioner of Police of the City; in relation to the metropolitan police district, the Commissioner of Police of the Metropolis; and elsewhere, the chief constable or head constable or other officer, by whatever name called, having the chief command of the police in the police district. In the present case the respondent Chapman, although he was in fact temporarily in chief command of the police in the absence of the chief constable, does not of necessity come within that definition of chief officer. In my opinion the question cannot be determined by the limits of the authority given to him by the resolution of July 21, 1909. If he came within the definition contained in the Act of 1871 his appointment to do certain things would not of necessity have limited his authority. No real difficulty will be introduced by our holding that the respondent Chapman was not of necessity the chief constable within the meaning of the Act of 1871, as the alternative right of applying to two justices or a stipendiary magistrate for the consent exists. I am of opinion that the Act of 1871 refers not to a person who is in fact exercising certain powers, but to an officer who is designated by name, and that the respondent Chapman had no power to give the written consent. The rule must therefore be made absolute.

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DARLING J. I am of the same opinion.

BUCKNILL J. I agree.

Rule absolute.

Solicitors for applicant: *Windybank, Samuell & Lawrence, for Benno Pearlman, Hull.*

Solicitors for respondents: *Sharpe, Pritchard & Co., for E. Laverack, Hull.*

J. E. A.

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Oct. 19.

BAKER *v.* COURAGE & CO.

Statute of Limitations—Money paid under a Mistake of Fact—Mistake shared by both Parties—Action to recover back—From what Date Statute begins to run—Whether Notice to Defendant of Mistake is necessary to complete Cause of Action.

Where in answer to an action to recover back money paid under a mistake of fact the defendant relies on the Statute of Limitations the statute must be taken to have run from the date of payment, and not from the date of the discovery of the mistake, nor from the date when the plaintiff might have discovered it by the exercise of reasonable diligence.

Brooksbank v. *Smith*, (1836) 2 Y. & C. Ex. 58, explained.

Where money has been paid under a mistake of fact which was shared by both the party paying and the party receiving it, in order to entitle the payor to maintain an action for the recovery back of the money so paid it is not necessary that he should have given the payee notice of the mistake and demanded repayment. In such a case the cause of action is complete the moment the money is paid.

Freeman v. *Jeffries*, (1869) L. R. 4 Ex. 189, distinguished.

TRIAL before Hamilton J. without a jury.

The plaintiff was a licensed victualler and the defendants were a brewery company. The action was brought to recover the sum of 1000*l.*, being the balance of money deposited by the plaintiff with the defendants. In February, 1869, the plaintiff, who then held the "Olive Branch" public-house at Tottenham for the residue of a long lease subject to a mortgage to the defendants, acquired the freehold reversion from a Mr. John Green, 1000*l.* of the purchase-money being left by Mr. Green on

mortgage of the freehold. In March, 1896, the plaintiff agreed to sell to the defendants for the sum of 18,000*l.* his leasehold and freehold interests in the premises, and also the stock in trade and effects thereon and the licences and policies held in connection therewith at a valuation. One firm of solicitors acted for both parties. In order to facilitate the completion of the transaction the defendants lent to the plaintiff 1000*l.* with which to pay off the mortgage to Mr. Green. The loan was not upon any security because it was expected that it would be repaid in a few days. The plaintiff and defendants respectively employed brokers, who made the necessary valuations and concurred in a statement of settlement which shewed that, after bringing into account the money due to the defendants upon the mortgage of the leasehold and certain other payments made by the defendants to the plaintiff or on his account, there was a balance due to the plaintiff of 9000*l.* In this statement the brokers by mistake omitted to debit the plaintiff with the 1000*l.* lent for the purpose of paying off Green, which would have reduced the balance due to the plaintiff to 8000*l.* The parties accepted the brokers' figures, and the non-inclusion of the 1000*l.* in the account was lost sight of. The defendants accordingly on March 31, 1896, paid the plaintiff the sum of 9000*l.*, and the plaintiff, who was an illiterate man and could not read, received that sum in good faith, it being about the amount that he had expected to get out of the sale. On the day following the completion the plaintiff agreed with the defendants to deposit with them the 9000*l.* at interest, and he deposited it with them accordingly. The plaintiff from time to time deposited further sums with the defendants, and from time to time drew out portions of the money so lying on deposit. In January, 1909, there being then a balance of 1000*l.* remaining on deposit, the plaintiff gave notice to the defendants to draw out that balance. It had happened that just before the receipt of that notice the defendants, who were desirous of knowing what the "Olive Branch" had cost them, instructed their solicitor to look into the documents relating to the purchase. On examination of them he discovered that the premises had cost the defendants 19,000*l.*, and that they

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had by mistake paid the plaintiff 1000*l.* too much. The defendants accordingly refused to repay the plaintiff the balance of his deposit, whereupon this action was brought. By their defence the defendants claimed to set off against the plaintiff's claim the 1000*l.* that they had overpaid the plaintiff by mistake in 1896. They also counterclaimed for the same sum together with interest. In reply the plaintiff contended that the set-off and counter-claim were barred by the Statute of Limitations.

Danckwerts, K.C., and *Mallinson*, for the defendants. The Statute of Limitations affords no answer to the defendants' claim. Where money has been paid under a mistake of fact the cause of action does not arise until the discovery of the mistake. In *Brooksbank* v. *Smith* (1) it was held that trustees who by mistake had transferred certain stock to a person not entitled to it might file a bill to compel the transferee to retransfer it at any time within six years after the discovery of the mistake, although more than six years had elapsed since the date of the transfer. It was decided that in cases of mistake the time of limitation, which by analogy to that prescribed by 21 Jac. 1, c. 16, is held to bar the remedy in Courts of Equity, begins to run from the time when the mistake is discovered. "In cases of fraud," said Alderson B., the Courts of Equity "hold that the statute runs from the discovery . . . . Mistake is, I think, within the same rule as fraud." That being the rule in equity before the Judicature Act, 1873, now by s. 24, sub-s. 2, of that Act all branches of the High Court are to give a party the same relief as the Court of Chancery ought to have given him in a suit instituted for the same purpose before that Act—a principle which has been applied to extend the time within which an action may be brought for deceit: *Gibbs* v. *Guild.* (2)

[HAMILTON J. Is there any case in which the statute has been held not to apply where the party paying the money had once known the facts but had temporarily forgotten them, as in the present case?]

A party is not disentitled to set up a claim that the money was paid under a mistake of fact merely because the mistake was

(1) 2 Y. & C. Ex. 58. (2) (1881) 8 Q. B. D. 296.

due to his own want of memory. That he once knew the true facts is immaterial if they were not present to his mind at the time of the payment: *Kelly* v. *Solari*. (1)

Secondly, in any event the statute only runs from the accrual of the cause of action. And in the case of money paid by mistake there is no duty upon the payee to refund it, and therefore the cause of action to recover it back does not accrue until notice of the mistake has been given to him and a demand made: per Martin and Bramwell BB. in *Freeman* v. *Jeffries*. (2) The cause of action, as Martin B. pointed out, is founded upon a contract which is implied where, a transaction having taken place between the parties, a state of things has arisen in reference to it which was not contemplated by them, but is such that the one party ought in justice and fair dealing to pay a sum of money to the other. But what possible ground is there for the implication of such a contract until the former party has had notice of the facts which give rise to the duty to pay? The same principle has been applied to the action for conversion of goods. In *Spackman* v. *Foster* (3) title deeds of the plaintiffs were fraudulently taken from them and deposited by a third person, without their knowledge, with the defendant in 1859, who held them without knowledge of the fraud to secure the repayment of a loan. The plaintiffs on discovering the loss of the deeds in 1882 demanded them of the defendant, and upon his refusal to give them back brought an action to recover them, to which the defendant pleaded the Statute of Limitations, and it was held that until demand and refusal to give up the deeds to the real owners they had no right of action against which the statute would run.

Boxall, K.C., and *R. E. Moore*, for the plaintiff. The rule of the Equity Courts as to the date from which the period of limitation begins to run in cases of money paid under a mistake of fact is too widely stated in the head-note to *Brooksbank* v. *Smith*. (4) It should be that it runs from the discovery of the mistake *or* from the date when it might with reasonable diligence have been discovered. This is what Alderson B. meant by his judgment in that case, for the reason that he there gave

(1) (1841) 9 M. & W. 54.
(2) L. R. 4 Ex. 189.
(3) (1883) 11 Q. B. D. 99.
(4) 2 Y. & C. Ex. 58.

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for the rule of equity that in cases of fraud the statute runs from the discovery was that "the laches of the plaintiff commences from that date, on his acquaintance with all the circumstances." And if, by reason of the plaintiff having the means of discovering the facts at an earlier date, the laches commenced before actual discovery, then the statute would run from that earlier date. And the same judge, Alderson B., expressly so decided four years later in the case of *Denys* v. *Shuckburgh*. (1) There Lord Pomfret in 1813 settled a share in certain mines upon Lady Charlotte Denys for ninety-nine years if he should so long live, and she entered into possession. Subsequently in 1826 Lord Pomfret conveyed his reversionary interest in the said share to the plaintiff. In 1830 Lord Pomfret died, and as neither Lady Charlotte nor the plaintiff understood that her interest in the settled share came to an end on the settlor's death, she continued in possession until her death in 1835. In 1832 the plaintiff went abroad, and he remained abroad until 1836. In 1839 the plaintiff's solicitor discovered the mistake, and a bill was filed against Lady Charlotte's executors and others for an account of the profits wrongly received. It was held that, as the plaintiff had the deed on which the question turned in his possession from 1826, and consequently had the means with proper diligence of removing the misapprehension of fact under which he laboured, he was not entitled to an account from the date of Lord Pomfret's death, but only for the period allowed by analogy to the Statute of Limitations, that is to say, six years before filing the bill, with a further additional period of a year in respect of the time during which he had been abroad. In the present case then, even if the rule of the Equity Courts applied to it, the statute must be taken to have begun to run in March, 1896, when the mistaken payment was made, because at that very time the defendants had the means of knowledge that they were in fact paying 1000*l.* too much.

But in truth the equity rule of *Brooksbank* v. *Smith* (2) and *Denys* v. *Shuckburgh* (1) has no application to such a case as the present, which is an ordinary common law action for money had and received. That rule only applied to equitable suits or claims

(1) (1840) 4 Y. & C. Ex. 42. (2) 2 Y. & C. Ex. 58.

for equitable relief in respect of matters which were not actionable at law and were not within the language of the Statute of Limitations; and the Judicature Act has made no difference in this respect. The only effect of s. 24 upon the question when the period of limitation commences to run in cases of mistake is that, in actions in which the relief sought is such as could in former times have been obtained only in a suit in the Equity Courts, all the Courts now are to administer the equitable rule that the period begins when the mistake could have been reasonably discovered; but in an ordinary common law action to recover back money paid by mistake the hard and fast rule of the statute still applies that the period runs from the accrual of the cause of action.

The case of *Kelly* v. *Solari* (1) is not in point. It decides nothing more than that the fact of money having been paid bona fide in forgetfulness of facts once known does not disentitle the person who so paid it from recovering it back as money paid by mistake. It does not touch the question of the time when the statute begins to run. Nor has the case of *Freeman* v. *Jeffries* (2) any bearing upon that question. All it decides is that where money has been paid under a mistake the person paying it is not entitled to maintain an action for money had and received until he has given notice of the mistake to the payee and demanded it back. It does not purport to decide that the plaintiff after discovering his mistake may for an indefinite time refrain from giving notice of the mistake to the defendant and thereby suspend the accrual of the cause of action, so that the statute will not run against him, however long he may hold his hand. It may be that the giving of notice is a necessary preliminary to the bringing of the action, but it is no part of the cause of action.

HAMILTON J. The question of law which I have to decide in this case is whether the Statute of Limitations, which is relied on by the plaintiff in reply, is an answer to the claim of the defendants, who seek to set off against the plaintiff's claim a sum of

(1) 9 M. & W. 54. (2) L. R. 4 Ex. 189.

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1000*l.* which was proved to have been paid by them to the plaintiff under a mistake of fact on March 31, 1896. The defendants have also counterclaimed for the same sum and interest. But no distinction was drawn in argument between capital and interest, and I shall treat the case as if the question turned only upon what were the rights of the parties at the time the money was paid.

For the defendants two points were made—first, that the statute did not begin to run until the discovery of the mistake by the defendants, and, secondly, that the statute did not begin to run until the cause of action was complete, and that the cause of action was not complete until the defendants had given the plaintiff notice of the discovery and demanded repayment of the money.

In support of the first contention reliance was placed upon the decision of Alderson B., sitting in equity, in the case of *Brooksbank* v. *Smith* (1) as establishing that the Equity Courts regarded cases of mistake as analogous to cases of fraud, and that, not being bound by the Statute of Limitations, though accustomed to follow the rule which it laid down, they dated the running of the period, which under their rule they regarded as barring the right to relief, from the discovery alike of a fraud or of a payment under a mistake of fact. I think that the interpretation put upon that case is erroneous. The point to be observed is that the relief there asked for was a purely equitable relief. A bill had been filed by trustees praying that the defendant should be decreed to retransfer to them certain stock standing in his name which they had transferred to him under the mistaken belief that he was entitled to an interest under the will of which they were the trustees. Therefore it was a case to which the Statute of Limitations did not apply; and the rule which was there laid down was one which in my opinion cannot be transferred to cases like the present, to which the statute does directly apply. In dealing with the latter class of cases Courts of Equity were just as much bound by the statute as were Courts of common law. But further, even if the present case were one in which

(1) 2 Y. & C. Ex. 58.

the defendants were seeking for equitable relief, so that the rule which the Equity Courts adopted by way of analogy to the statute applied, I do not think that that rule is what the defendants have supposed it to be, or that the language of Alderson B. in *Brooksbank* v. *Smith* (1) supports their contention. What he there said was this: "In cases of fraud . . . they hold that the statute runs from the discovery, because the laches of the plaintiff commences from that date, on his acquaintance with all the circumstances. In this Courts of Equity differ from Courts of law, which are absolutely bound by the words of the statute. Mistake is, I think, within the same rule as fraud." The reason he there gives for the period being held to run from the discovery, namely, that the plaintiff's laches commences from that date, shews that he did not mean to confine its running to cases in which there was actual discovery. Reasonable means of discovery stood on the same footing as actual discovery for this purpose. Where a party had not the means of knowing the truth, equity would not consider laches to be attributable to him, and therefore the equitable period of limitation would not run against him. And this was equally so whether his ignorance or absence of means of knowledge were with regard to a fraud or with regard to a mistake. That this was Alderson B.'s meaning seems clear from a comparison of his decision in the later case of *Denys* v. *Shuckburgh*. (2) There a tenant in common of certain mines, having in consequence of a mistake for more than six years received less than his proper share of the profits, filed his bill for an account. As he had had the means of discovering the mistake from its very commencement, he was held entitled to have the account taken only for the period limited by the statute and not from the date of the original mistake. "Here it seems to me," said Alderson B., "that the plaintiff had the means with proper diligence of removing the misapprehension of fact under which I think he did labour. He had in his power the deed on which the question turns; and although it is perhaps rather obscurely worded, still I think he has allowed too much time to elapse not to be fairly considered as guilty of some negligence; and a Court of Equity, unless the mistake be

(1) 2 Y. & C. Ex. 58 (2) 4 Y. & C. Ex. 42.

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clear and the party be without blame or neglect in not having discovered it earlier, ought in the exercise of a sound discretion to adopt the rule given by the statute law as its guide. That is what I shall do here." That then being the rule of the Equity Courts in cases not falling directly within the language of the statute, even if the present were such a case, I should be prepared to hold that the defendants would have had six years within which to make their claim and no more. For they had the means of knowing the truth from the very time when they made the payment on March 31, 1896, if they had chosen to examine their books and compare those books with the contract of purchase. But it was said that the case of *Kelly* v. *Solari* (1) is an authority that it is quite immaterial that the parties making the payment had the means of knowing the truth by the examination of their books, if in fact they did not know it, in the sense of not having it present to their minds at the time of the payment made. If that were right it would largely diminish the protection which the statute was intended to afford; and I can see no reason why, if the party making the payment were a corporation, which does not die, the claim to recover the money back on discovery of the mistake might not be made after a lapse of fifty or even a hundred years. But if the case of *Kelly* v. *Solari* (1) be looked at it will be seen that no question of the Statute of Limitations arose there at all. What happened there was that an insurance company of which the plaintiff was a director paid on a policy, although if they had recalled the knowledge they once had they would have known that they had a perfect defence to the claim because the policy had lapsed. The plaintiff having brought an action to recover the money so paid, the judge at the trial told the jury that if the directors had had knowledge or the means of knowledge of the policy having lapsed the plaintiff could not recover, and that their afterwards forgetting it would make no difference. The Court of Exchequer held that direction to be wrong and ordered a new trial. The question whether money can be recovered as having been paid under a mistake of fact depends upon the state of mind of the plaintiff at the time when the money was paid, just as in an action of deceit the

(1) 9 M. & W. 54.

liability of the defendant depends upon the untruth of the representation having been present to his mind at the time that the representation was made. You may be slow to believe the plaintiff if he says he had known the true facts but had forgotten them, but if you once arrive at the conclusion that he had in fact forgotten them and had paid the money under a misapprehension as to those facts, then he is entitled to recover the money unless he is already barred by the Statute of Limitations. But the case of *Kelly* v. *Solari* (1) has no bearing upon the question when the Statute of Limitations commences to run in that class of action.

It remains to deal with the defendants' second contention, that their cause of action was not complete until notice of the mistake had been given to the plaintiff and a demand had been made. It was said that the cause of action is in the nature of a breach by the payee of a duty to hand over money which ex æquo et bono does not belong to him, but belongs to the payor, and that there can be no breach of that duty where the facts which give rise to the duty have not been brought to the payee's attention. It is clear that if that is right the payor might postpone the notification of his discovery and the making of his demand for an unlimited time and yet not have the statute run against him. But I think that the contention is fallacious. It seems to me that the cause of action in this case was complete independently of any notification of the discovery. The mistake was one which Mr. Baker made as well as Messrs. Courage; it was common to both parties. Mr. Baker expected that the 1000*l.* which the defendants had lent him to pay off the mortgagee would be repaid to them upon the completion of the purchase; he intended it to be done and took the 9000*l.* in the belief that it had been done. Under those circumstances it does not appear to me that notice of the mistake was necessary to raise a duty in Mr. Baker to pay the overpayment back. It was money had and received to the use of the defendants because it was money for which there was no consideration. Reliance was indeed placed by the defendants upon a case of *Freeman* v. *Jeffries* (2), the decision in which would bind me if the facts were the same, for

(1) 9 M. & W. 54. (2) L. R. 4 Ex. 189.

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both Martin and Bramwell BB. held that the action there, which was an action for money paid by mistake, was not maintainable without previous demand. But in that case at the time the first instalment of the money was paid neither the plaintiff nor the defendant made any mistake. The mistake was made by the two valuers who were subsequently employed to value the farm which was the subject-matter of the sale. It was not until the plaintiff afterwards consulted a third valuer on his negotiating for the resale of the property that he discovered that the former valuers had included in their valuation certain items which they ought not to have included, and after this he paid over the balance of the money to the defendant at a time when he knew of the valuers' mistake but the defendant did not. It was under those circumstances that Martin and Bramwell BB. held that there was no duty on the defendant to repay the excess valuation until after notice of the mistake, which was not his mistake and of which he was unaware. I think it is clear that they so decided without reference to a case in which not only the party paying paid under a mistake, but also the party receiving the money was under a mistake at the time when he received it. In my opinion, therefore, the case of *Freeman* v. *Jeffries* (1) does not support the contention of the defendants. But then it was said that this principle of the necessity of notice and demand as a condition of the completion of the cause of action is of general application and applies to all cases in which the defendant is required to return something which has come innocently into his possession but which he is not entitled to keep. And reference was made to the case of *Spackman* v. *Foster* (2), where the action was in detinue for certain title deeds. The defendant there had advanced money on the deposit of the deeds without notice of the want of title in the depositor. Twenty-three years later the owner of the deeds discovered their loss and brought the action to recover them. It was held that until the defendant was informed of the plaintiff's title his possession of the deeds was not adverse to the plaintiff, with the consequence that until then the statute did not begin to run. I do not think that

(1) L. R. 4 Ex. 189.

(2) 11 Q. B. D. 99.

that case has any application to the present one. There must be judgment for the plaintiff.

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Judgment for the plaintiff.

Solicitors for plaintiff: *Bayley, Adams, Hawker & Co.*
Solicitors for defendants: *Nye, Moreton & Clowes.*

J. F. C.

STIRLING *v.* SILBURN & PYMAN.

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Oct. 16.

Money-lender — "Usual Trade Name" — Registered Name — Money-lender Partner in a Firm carrying on Moneylending Business at one Address in a Partnership Name—Moneylending Business also carried on by Money-lender in a different Name at a different Address—Money-lenders Act, 1900 (63 & 64 *Vict. c.* 51), *s.* 2.

By s. 2, sub-s. 1 (*a*), of the Money-lenders Act, 1900, a money-lender shall register himself as a money-lender "under his own or usual trade name, and in no other name":—

Held, that the expression "usual trade name" means the name by which the money-lender elects at the time of registration to be known, whether he adopted it before or after the commencement of the Act.

Held, further, that a money-lender who carries on business at one address as a member of a firm with a partnership name, and at the same time carries on business alone at another address in a name different from that of the partnership, commits a breach of the provisions contained in s. 2, sub-s. 1 (*b*), of the Act, for which he is liable to a penalty under s. 2, sub-s. 2, and that a promissory note given to him at the address where he carries on business alone, by way of security for a loan made by him at that address in the name he uses there, is void.

TRIAL before Bucknill J. in the short cause list.

The action was brought to recover 800*l.*, the amount alleged to be due to the plaintiffs (a partnership trading as money-lenders under the name of "C. Stirling") as the holders of a promissory note for that sum dated March 17, 1909, made by the defendants.

The material facts were that until June 7, 1906, one Charles Stone had carried on a moneylending business in his own name at 28, Bloomsbury Street. He had registered his own name, C. Stone, under the Money-lenders Act, 1900.

On June 7, 1906, C. Stone registered the name "George

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Selby," and from that date until February, 1908, carried on the moneylending business at 28, Bloomsbury Street in the name of "George Selby."

In February, 1908, he took one Joel Ford into partnership. The partnership was registered under the name of "George Selby" and was carrying on a moneylending business at 28, Bloomsbury Street on March 17, 1909.

On February 9, 1909, C. Stone registered the name "C. Stirling" at the address 84, Jermyn Street, and was carrying on a moneylending business alone at that address under the name "C. Stirling" on March 17, 1909. On that date, after some negotiations had taken place between the defendants and C. Stone at 28, Bloomsbury Street, and also at 84, Jermyn Street, the defendants gave the promissory note at 84, Jermyn Street to C. Stone in consideration of an advance made by him to them at that address. The promissory note was as follows:

"£800.

"London, March 17th, 1909.

"We jointly and severally promise to pay C. Stirling or order at 84 Jermyn Street London S.W. the sum of eight hundred pounds for value received by four consecutive quarterly payments of two hundred pounds each, the first of such payments to become due and payable on the 17th day of June 1909. In default of any one or more payments or any part thereof the whole amount then left unpaid to become due and payable.

"R. J. S. Silburn.

"Thos. E. Pyman."

On June 19, 1909, C. Stone took his brother Isidore Stone into partnership. The partnership was registered on that date in the name "C. Stirling" at 84, Jermyn Street, and C. Stone indorsed the note to the partnership "C. Stirling." The partnership continued to trade in the name "C. Stirling" at 84, Jermyn Street.

The defendants made default in payment of the sum of 200*l.* due on June 17, 1909, and the action was thereupon brought against them by the partnership "C. Stirling."

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The defendants contended that the note was void on the ground that C. Stone could only lawfully carry on business in his own name, inasmuch as the expression "usual trade name" in s. 2, sub-s. 1 (*a*), of the Money-lenders Act, 1900 (1), does not include a name which the money-lender at the time of registration intends to be his future trade name, but which he has not used before; that, as immediately the Act came into operation every money-lender was required to register his own or usual trade name, no money-lender who did not register a trade name at the time the Act came into operation could subsequently use it or register it as a usual trade name; and that, as C. Stone did not register either the name "George Selby" or "C. Stirling" before the Act came into operation, those registrations were both bad in law. The defendants also submitted that the plaintiffs could not recover upon the note inasmuch as at the time the note was given to C. Stone he was a member of the firm "George Selby" and was also carrying on a moneylending business individually in the name of "C. Stirling" contrary, it was contended, to the provisions of s. 2, sub-s. 1 (*b*), of the Money-lenders Act, 1900.

(1) Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 2, sub-s. 1: "A money-lender as defined by this Act—

"(*a*) shall register himself as a money-lender in accordance with regulations under this Act . . . . under his own or usual trade name, and in no other name, and with the address, or all the addresses if more than one, at which he carries on his business of money-lender; and

"(*b*) shall carry on the money-lending business in his registered name, and in no other name and under no other description, and at his registered address or addresses, and at no other address; and

"(*c*) shall not enter into any agreement in the course of his business as a money-lender with respect to the advance and repayment of money, or take any security for money in the course of his business as a money-lender, otherwise than in his registered name;"

Sub-s. 2: "If a money-lender fails to register himself as required by this Act, or carries on business otherwise than in his registered name, or in more than one name, or elsewhere than at his registered address, or fails to comply with any other requirement of this section, he shall be liable on conviction" to certain fines and imprisonment.

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M. Shearman, K.C., and *Lowenthal*, for the plaintiffs. There is nothing in the Money-lenders Act, 1900, to prevent a firm of which the members are A. and B. carrying on business in a partnership name at one address and A. individually carrying on business in his registered name elsewhere. That practice is contemplated by the Commissioners of Inland Revenue in the forms which they issue for the use of money-lenders in registering their names. The mischief at which the Act of 1900 was aimed was that which resulted from the same individual carrying on business as a money-lender at two or more different places, with a different name at each place. [*Gadd* v. *Provincial Union Bank* (1) was referred to.]

Ritter and *Condy*, for the defendants. Sect. 2, sub-s. 1 (*a*), of the Money-lenders Act, 1900, shews that a money-lender must use either his own name or his "usual trade name." The expression "usual trade name" means an assumed name which the money-lender was using for the purpose of his trade at the time the Act was passed. Therefore C. Stone never had a "usual trade name," for the only name he used up to June 7, 1906, was his own name. He could therefore only use his own name, and the registrations of "George Selby" and "C. Stirling" were both bad, and any transaction carried out in any other than his own name is void: *In re a Debtor, Ex parte Carden.* (2) The promissory note given by the defendants is therefore void and cannot be enforced.

Secondly, s. 2, sub-s. 1 (*b*), of the Money-lenders Act, 1900, prevents a money-lender using two names in carrying on business, and it is immaterial that he carries on business at one place in his own name and at another place under a different name in conjunction with other persons. It was therefore illegal for C. Stone to carry on business in partnership under the name of "George Selby" and at the same time individually in the name of "C. Stirling." On that ground also the promissory note is void.

M. Shearman, K.C., in reply. The expression "usual trade name" in s. 2, sub-s. 1 (*a*), of the Money-lenders Act, 1900, means a name which has been adopted by the money-lender,

(1) [1909] 2 K. B. 353. (2) (1908) 52 Sol. J. 209.

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whether before or after the passing of the Act, as his usual trade name. That interpretation has been placed upon the words since the Act of 1900 came into operation. It was not the intention of the Legislature to prevent money-lenders using assumed names; the object was to stop an individual using a multiplicity of names. A person's "usual trade name" is the name he adopts as his usual trade name. There is nothing in the Act of 1900 which prevents C. Stone having, as a member of a firm, the usual trade name of "George Selby" at 28, Bloomsbury Street, and, as an individual, the usual trade name of "C. Stirling" at another address. A decision to the contrary would be almost tantamount to saying that a money-lender cannot trade in an assumed name.

Secondly, the words "shall carry on the moneylending business in his registered name" in s. 2, sub-s. 1 (*b*), of the Money-lenders Act, 1900, do not mean that the money-lender must only carry on business by himself, and they do not prevent him from also carrying on business at the same time in partnership in another registered name, provided there is a genuine partnership. The Money-lenders Act, 1900, is a prohibitive and penal measure, and if the Legislature had intended to prohibit a money-lender who is carrying on business at one place having a share in another moneylending business carried on at another place it would have used the clearest possible language.

Even if the provisions of the Act of 1900 have been broken, the only result is that the money-lender becomes liable to a penalty. The particular transaction is not avoided, and the promissory note can therefore be enforced against the defendants.

BUCKNILL J. in delivering judgment, after stating the facts, continued:—I find that nothing took place at 28, Bloomsbury Street beyond negotiations, and the loan was contracted at 84, Jermyn Street. It has been contended on behalf of the defendants that C. Stone could not after the Money-lenders Act, 1900, came into operation legally use the name of "C. Stirling" as his registered name, because he did not register it at that time, and that therefore the subsequent

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registration of that name was bad, because it had not been, before he registered it, his usual trade name. I cannot accede to that argument. I think that the form of return to be made by money-lenders issued by the Commissioners of Inland Revenue under s. 3 of the Money-lenders Act, 1900, shews that the Commissioners did not place that construction upon the statute. In that form there is a space for the money-lender's own or usual trade name in which the money-lender is to be registered, and there is a separate column for insertion of the "actual name, &c., of the person in question." When C. Stone registered himself as "C. Stirling" on February 9, 1909, he filled up the form with the name "C. Stirling" as his usual trade name. It was an assumed name. It was not his usual trade name in the sense that he carried on business before in the name of "C. Stirling," but it was the name that he was then adopting and wished to be his usual trade name. He filled up the column of the form for the insertion of the actual name by writing in his name Charles Stone. I am of opinion that the provision in s. 2, sub-s. 1 (*a*), of the Money-lenders Act, 1900, that a money-lender shall register himself as a money-lender "under his own or usual trade name, and in no other name," does not mean that at the time he registers himself he must, in order to lawfully register a trade name, have a trade name which has previously been and then is his usual trade name. I think a money-lender can lawfully register a name by which he elects at the time of its registration to be known, whether he adopted it before or after the Act of 1900 came into operation.

The second point seems to me to be a much more difficult one. C. Stone was at the time the loan was made carrying on business not only at 28, Bloomsbury Street, but at 84, Jermyn Street. The whole of the transaction which is the subject of the present action was carried out and completed at 84, Jermyn Street between C. Stone, trading under the name of C. Stirling, and the defendants. The difficult question that now arises is whether under s. 2, sub-s. 1 (*b*), of the Money-lenders Act, 1900, that is a matter which makes the whole of the transaction void. C. Stone has two addresses. At one of them he and another person carry

on business in partnership, and at the other address he carries on business alone. The contract which is the subject of the present action was made at the place where he alone carries on business. The question is whether that contract is vitiated because he carries on business with another person in another name at another registered address.

On this point I am in favour of the defendants. I do not think the Money-lenders Act, 1900, allows a money-lender to carry on a moneylending business in one place under the name of A. and another business in another place under the name of A. and B. If that is so, can this transaction stand? In my opinion it cannot. I have not had an opportunity of fully considering the point, but as at present advised I am of opinion that the fact that Mr. C. Stone has done that renders him liable under the Money-lenders Act, 1900, to a penalty of 100*l.*, and there are authorities to the effect that where an enactment is in its nature punitive the legal consequence is that a transaction which has taken place between parties, one of whom has offended against the enactment, is void. I am sorry to have to decide against the plaintiffs because the consequence of my decision will be that a hardship will be inflicted upon them. I hold purely as a matter of law that my judgment must be for the defendants on the second point.

Judgment for defendants.

Solicitor for plaintiffs: *I. Goldman.*
Solicitor for defendants: *J. K. Torkington.*

J. E. A.

1909
Oct. 28.

PHARMACEUTICAL SOCIETY OF GREAT BRITAIN *v.* MERCER.

Pharmacy Acts—Unregistered Pharmaceutical Chemist—Use of "name, title, or sign"—"Pharmacy"—Implication—Pharmacy Act, 1852 (15 & 16 *Vict. c.* 56), *s.* 12.

Sect. 12 of the Pharmacy Act, 1852, provides that if a person, not being registered under the Act as a pharmaceutical chemist, shall assume, use, or exhibit any name, title, or sign implying that he is a person registered under the Act or that he is a member of the Pharmaceutical Society he shall be liable to a penalty.

The defendant carried on the business of a vendor of medicine at a shop over the door of which was his name followed by the words "The Pharmacy." The defendant was not registered as a pharmaceutical chemist under the Act of 1852:—

Held, that the defendant had not assumed, used, or exhibited a name, title, or sign implying that he was registered under the Act of 1852 or that he was a member of the Pharmaceutical Society.

Appeal from St. Helens County Court.

The action was brought to recover a penalty under s. 12 of the Pharmacy Act, 1852. (1) The defendant carried on the business of a vendor of medicine at a shop over the door of which were the words "R. Mercer & Co., The Pharmacy, Haydock." Labels bearing the same words were attached to the bottles of medicine sold in the shop. The defendant was not registered as a

(1) Pharmacy Act, 1852 (15 & 16 Vict. c. 56), s. 12: "From and after the passing of this Act, it shall not be lawful for any person, not being duly registered as a pharmaceutical chemist according to the provisions of this Act, to assume or use the title of pharmaceutical chemist or pharmaceutist in any part of Great Britain, or to assume, use, or exhibit any name, title, or sign implying that he is registered under this Act, or that he is a member of the said society; and if any person, not being duly registered under this Act, shall assume or use the title of pharmaceutical chemist or pharmaceutist, or shall use, assume, or exhibit any name, title, or sign implying that he is a person registered under this Act, or that he is a member of the said society, every such person shall be liable to a penalty of five pounds; and such penalty may be recovered by the registrar to be appointed under this Act, in the name and by the authority of the council of the said society, in manner following; (that is to say,)

In England or Wales, by plaint under the provisions of any Act in force for the more easy recovery of small debts and demands . . . ."

pharmaceutical chemist under the Act of 1852 and was not a member of the Pharmaceutical Society of Great Britain.

The county court judge held that the use of the word "pharmacy" in the manner above mentioned was a "sign" implying that the person who carried on business at the place was registered under the Act or was duly qualified to dispense medicines as required by the Act, and he accordingly gave judgment for the plaintiffs for 5*l*.

The defendant appealed.

A. Neilson, for the defendant. The county court judge wrongly construed the section. The Court of Appeal in *Bellerby* v. *Heyworth* (1), overruling *Barnes* v. *Brown* (2), and approving of *Emslie* v. *Paterson* (3), laid down the test which should govern cases as to unqualified practitioners, and the test is, Does the alleged wrongful description apply to the person or to the acts done by that person? If the latter, then there is no offence committed. Here the description complained of is the use of the word "pharmacy." The word simply means a place where drugs are sold, and the use of that word, which is descriptive of the place and not of the person, cannot be held in law to imply that the person carrying on business at that place is a registered pharmaceutical chemist or a member of the Pharmaceutical Society.

[He was stopped.]

R. L. Vaughan Williams, for the plaintiffs. If the language of s. 12 is wide enough to enable the county court judge to draw the inference of fact which he did draw, his judgment cannot be reversed; and for the purpose of drawing the inference the judge was entitled to take into consideration not only the fact that the defendant described his premises as "The Pharmacy," but that he was in fact carrying on a chemist's business there: *Barnes* v. *Brown*. (2) The preamble to the Act of 1852 shews that the scope of the Act is to prevent the use of any names, titles, or signs which suggest or convey the idea that a person is qualified under the Act, and the use of any word like "pharmacy"

(1) [1909] 2 Ch. 23. (2) [1909] 1 K. B. 38.
(3) (1897) 24 R. (Just. Cas.) 77.

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is now a matter from which the Court can imply that the person using it has described himself as a qualified pharmaceutical chemist. Sect. 15 of the Pharmacy Act, 1868, prohibits the use of the description "pharmacist" by a person who is not a pharmaceutical chemist. The language of s. 12 of the Act of 1852 is wider than that of s. 3 of the Dentists Act, 1878, on which *Bellerby* v. *Heyworth* (1) was decided, and the present case is much more like *Royal College of Veterinary Surgeons* v. *Robinson* (2), where the use of the words "veterinary forge" was held to constitute a description that the man was specially qualified as a veterinary surgeon. In *Panhaus* v. *Brown* (3) the description "German Dental Institute" was held to imply that the man was a dentist; so here the description "The Pharmacy" applied to a place where the business of a chemist is carried on implies that the man is a registered pharmaceutical chemist.

Neilson in reply. Under s. 3 of the Poisons and Pharmacy Act, 1908, a person who is a registered chemist and druggist may now describe himself as a "pharmacist" although he is not a registered pharmaceutical chemist, but if the contention of the plaintiffs is right the lawful use by a registered chemist of the name "pharmacist" would raise the implication that he was describing himself as a pharmaceutical chemist in contravention of s. 12 of the Act of 1852. In *Panhaus* v. *Brown* (3) the description did not contain the name of the practitioner; here the defendant's name was put up, and the words "The Pharmacy" could only apply to the premises, not to the man himself. [*Royal College of Veterinary Surgeons* v. *Collinson* (4) was also referred to.]

DARLING J. In this case it is admitted that the defendant carried on the business of a vendor of medicines at premises called "The Pharmacy," and it is said that by so doing he has infringed s. 12 of the Pharmacy Act, 1852, in that he has used a name or sign implying that he is registered under that Act or that he is a member of the Pharmaceutical Society of Great Britain. I agree with the contention of Mr. Vaughan Williams

(1) [1909] 2 Ch. 23.
(2) [1892] 1 Q. B. 557.
(3) (1904) 68 J. P. 435.
(4) [1908] 2 K. B. 248.

that the county court judge was entitled to take into consideration not only the use of the word "pharmacy," but also the class of business carried on on the premises, and I think that the use of that word does raise an implication that the business of medicine vending is carried on there. That implication is, of course, one which may be rebutted by evidence; but even if it were not, that is not conclusive of this case, because it is not an offence under s. 12 for an unregistered person to carry on the business of a vendor of medicines. It is contended, however, for the plaintiffs that the defendant has represented himself not merely as a man carrying on a drug business at a pharmacy, but as a registered pharmaceutical chemist and a member of the Pharmaceutical Society. In *Bellerby* v. *Heyworth* (1), which overruled *Barnes* v. *Brown* (2), the Court of Appeal had to consider the meaning and effect of s. 3 of the Dentists Act, 1878, which contains language similar to that of s. 12 of the Pharmacy Act, 1852, and in that case Cozens-Hardy M.R. said: "As I read that section it is directed to the personal description of the man as distinguished from the description of the work which the man does*; and Buckley L.J. said: "But, subject to that difficulty in drawing the line, I feel no doubt in laying it down as a general proposition that what this section forbids is a description of the person as distinguished from a description of the acts done." We have, therefore, in this case to consider whether the matter complained of, namely, the use of the word "pharmacy" as the name of the premises, is a description of the defendant from which it can be implied that he is a registered pharmaceutical chemist, or whether it is a description of the acts done by the defendant on the premises, that is to say, the selling of medicines. In my opinion the latter is the correct view, for I do not think that the use of the word "pharmacy" with the selling of medicines on the premises necessarily raises the implication that the defendant is a pharmaceutical chemist registered under the Act of 1852. There is another reason why, in my opinion, the use of the word "pharmacy" does not raise that implication. Under s. 3 of the Poisons and Pharmacy Act, 1908, a registered chemist or druggist is permitted to use or exhibit the name or

(1) [1909] 2 Ch. 23. (2) [1909] 1 K. B. 38.

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Darling J.

title of pharmacist, although he may not be a registered pharmaceutical chemist or a member of the Pharmaceutical Society, and it seems to me that, if the use of the word "pharmacy" raises the implication contended for by the plaintiffs in this case, it might equally well be contended that a person who was entitled to and did call himself a pharmacist had used a name or title which implied that he was a registered pharmaceutical chemist.

For both these reasons I am of opinion that this action fails, and the appeal must be allowed.

BUCKNILL J. I agree that this appeal must be allowed, but I prefer to deal with the case solely under s. 12 of the Act of 1852. The question is whether the defendant has assumed the title of pharmaceutical chemist, or has used, assumed, or exhibited a name, title, or sign implying that he is a person registered under the Act of 1852 or that he is a member of the Pharmaceutical Society. What he has done is to exhibit the word "pharmacy" over the door of the shop in which he carries on the business of a vendor of medicines. That word is, in my opinion, a description of the place, and not of the person who carries on business in the place, just as the words "dentistry" and "dental office" were held in *Emslie* v. *Paterson* (1) to be a description of a place and not of a person; and it would, I think, be going too far to say that the use of this word, descriptive of a place, was a representation or gave rise to an implication that the person who occupied the premises was a registered pharmaceutical chemist. In *Bellerby* v. *Heyworth* (2) Buckley L.J., referring to the Dentists Act, 1878, said: "I think that under this Act of Parliament any man may say that he does dental acts, but he must not, unless he is a qualified person, say that he does them as a dentist." So here the defendant is entitled to say that he carries on the business of a vendor of medicines, but he must not describe himself as a registered pharmaceutical chemist, and on the admitted facts I can see nothing which justified the county court judge in coming to the conclusion that the use of the word "pharmacy" implied that

(1) 24 R. (Just. Cas.) 77. (2) [1909] 2 Ch. 23.

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the defendant was a person registered under the Act of 1852 or was a member of the Pharmaceutical Society.

On this short ground I think the appeal ought to be allowed.

Appeal allowed: Leave to appeal.

Solicitors for plaintiffs: *Flux, Thompson & Quarrell, for Risque & Robson, Manchester.*

Solicitors for defendant: *Emmet & Co., for Smith, Youatt & Smith, Manchester.*

F. O. R.

[IN THE COURT OF APPEAL.]

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Nov. 9.

MARSHALL *v.* ORIENT STEAM NAVIGATION COMPANY, LIMITED.

Employer and Workman — Compensation — Accident — Refusal to undergo Operation—Cause of Incapacity—Onus of Proof—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

A seaman on board ship, having injured his finger as the result of an accident arising out of and in the course of his employment, refused to undergo a slight operation proposed by the ship's doctor. After his discharge he was compelled to have his finger amputated. Upon an application by him for compensation under the Workmen's Compensation Act, 1906, the county court judge found that the applicant acted unreasonably in refusing to submit to the operation proposed by the ship's doctor, but, having regard to the conflict of medical testimony, was unable to come to any conclusion upon the question whether the operation would have saved the finger:—

Held, that the employers had failed to discharge the onus which lay upon them of proving that the loss of the finger was due not to the accident, but to the refusal to submit to the operation, and that the applicant was entitled to compensation.

APPEAL from a decision of the county court judge at Grays sitting as arbitrator under the Workmen's Compensation Act, 1906.

At the date of the accident hereinafter mentioned the applicant was employed by the respondents as fireman on board the steamship *Orontes*.

On April 3, 1909, while the applicant was engaged in preparing

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to make a furnace fire, he took hold of the blast check by the side of the furnace door for the purpose of shutting off the blast, and owing to the overheating of the handle of the check three fingers of his hand were burned. The fingers were blistered, and on April 6 a blister on the middle finger broke, and poisoning resulted.

On April 14 Mr. Geoffrey Lucas, the ship's surgeon, made an incision in the wound with a pair of surgical scissors, and on the 15th he told the applicant he must make more incisions, but the applicant refused to submit to any more cutting.

On May 1, on the arrival of the ship at Tilbury Docks, the applicant was discharged.

On May 3 he consulted Dr. J. A. Ward, who told him that the finger would have to be amputated. Thereupon the applicant went to the Seamen's Hospital at Greenwich, where the operation was performed on May 5.

After his discharge from the hospital the applicant claimed compensation from the respondents. The respondents by their answer alleged that the injury was solely the result of the applicant's refusal to submit to proper treatment.

At the hearing of the application the applicant stated in the course of his evidence that he felt a pain up his arm from the wound in his finger at the time when the second operation was proposed. There was a conflict of medical testimony on the question whether the finger could have been saved if the applicant had submitted to an operation on April 15. Dr. Ward on this point said that the pain in the arm of which the applicant complained indicated that further lancing or cutting would not have saved the finger. Mr. Lucas, on the other hand, stated that if the applicant had submitted to the operation he would have recovered and could have returned to work in ten days; it would have effected a permanent cure.

The county court judge arrived at the conclusion on the evidence that it was unreasonable under the circumstances for the applicant to have refused to submit to the operation. It was the very best thing under the circumstances that could have been done, and the course which the applicant took was the very worst for his finger, by not having the wound kept open and in a healthy

condition. But having regard to the conflict of medical testimony on the question whether the operation would have saved the finger or not, he found it impossible to come to any conclusion one way or the other on that point, and as in fact the finger had been lost, he made an award in favour of the applicant. He awarded 15*s.* 6*d.* per week, to be reduced to one penny per week on July 21, the date at which Dr. Ward said that the applicant would be able to go to work.

The employers appealed.

Alexander Neilson, for the employers. The county court judge found that the applicant was unreasonable in refusing to submit to the operation, but he was not satisfied that the hand would have been cured without loss of the finger. On these findings the judge ought to have made an award in favour of the employers according to the test laid down in *Warncken* v. *R. Moreland & Son, Ld.* (1) and *Tutton* v. *Owners of Steamship Majestic.* (2) In the latter case the Master of the Rolls says that the test is whether the applicant acted unreasonably, and Fletcher Moulton L.J. says that the real issue is the reasonableness or unreasonableness of the man.

[FLETCHER MOULTON L.J. You must shew that the unreasonableness of the man broke the chain of causation. I never intended to say anything contrary to that.]

The two findings of the county court judge are inconsistent. It is inconsistent for the judge to find that the man was unreasonable in refusing to submit to the operation unless he was of opinion that the operation would in all probability effect a recovery. In arriving at a decision on the question of unreasonableness the judge must necessarily consider what the result of the operation would be. The judge accepted the evidence of the ship's doctor, who was the only person who could give evidence of any value as to the state of the man's hand at the time of the refusal, and there is no evidence to displace that. The other doctor did not see the applicant until some weeks later, and his evidence is of no practical value. There was therefore no evidence which would justify the judge in saying

(1) [1909] 1 K. B. 184. (2) [1909] 2 K. B. 54.

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that he was not satisfied that the operation would have cured the hand.

Frank Phillips, for the workman.

[FARWELL L.J. My difficulty is that the finding of unreasonableness involves that the recovery of the hand is reasonably clear. A man is unreasonable in refusing to submit to an operation, not being a serious operation, if it is the best thing to be done at the moment and would probably cure him.]

If, as the man says, there was pain up the arm at the time of his refusal, that, according to the medical evidence, indicates that it was then too late to save the finger. Prima facie the incapacity is the result of the accident; the onus is on the employers to prove that the incapacity was due to the man's unreasonableness; and if they fail to satisfy the judge that the operation would have removed the incapacity they have not discharged the onus which was upon them. The judge found that the man had unreasonably refused a chance and not a certainty.

Alexander Neilson, in reply, referred to the judgment of Lord M'Laren in *Donnelly* v. *William Baird & Co., Ld.* (1)

COZENS-HARDY M.R. This is one of those cases of which we have had several in this Court—cases undoubtedly of difficulty, but cases as to which I was sanguine enough to think that this Court had laid down rules for the guidance of county court judges. In this case a fireman on board ship meets with an accident which resulted in the burning of his finger. The ship's doctor says "You had better have a slight operation; I think it will do you good and cure you"; but the man says "I will not." The county court judge may very well say that it was an unreasonable thing on the part of the fireman not to undergo a slight operation, not involving any risk to life, recommended by the only medical man who was at hand. But if other doctors say that even if the operation had been performed the finger would have been lost, in my opinion, there is a second issue of fact for the county court judge to find. Having first found that the man was unreasonable in refusing to undergo the operation, he must then go on to find whether the loss of the finger is to be attributed to

(1) (1908) 45 Sc. L. R. 394.

his unreasonableness. I am never fond of quoting my own judgments, but I should like to read one passage in my judgment in *Warncken* v. *R. Moreland & Son, Ld.* (1) I there said "I do not understand how any one can doubt that under the present circumstances the true inference of fact is that the continuance of the incapacity is not due to the original accident, but is due to this workman's unreasonable refusal to take a step which any reasonable man would willingly submit to." It is an issue of fact for the county court judge to say, in the first place, was the refusal reasonable or unreasonable; but that is not enough. Having found that the refusal was unreasonable, he must go further and find that the continued disability was not due to the accident, but was due to the man's unreasonableness in refusing to submit to the operation. Here the learned county court judge in his extremely careful judgment, after finding that the man was unreasonable in not following the advice of the ship's doctor, says this: "But the difficulty I have to face is this. Would the operation have saved the finger? Dr. Ward said he thought the finger was so implicated that it would not. Dr. Lucas said that in his judgment, having regard to the condition of the finger when he saw it on April 14, the operation would have been perfectly successful. In that state of things what ought to be my decision? It is a case in which it is absolutely impossible to say whether the operation would have saved the finger or not." What does that amount to? I think it amounts to this: There was an accident, and it is for the employers to shew that something has happened the result of which is that the loss of the finger is not due to the accident. The burden is upon the employers to break the chain of causation. In a case like this it seems to me that it is impossible for this Court to say there was not evidence upon which the learned county court judge was entitled to say that the burden of proof was not discharged, that the original liability arising from the accident remained upon the employers, and that the workman was therefore entitled to compensation. I am not conscious that in what I have said in this case I have departed one hair's breadth from anything that I said in *Tutton* v. *Owners of*

(1) [1909] 1 K. B. 184, at p. 188.

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Steamship Majestic (1) or in *Warncken* v. *R. Moreland & Son, Ld.* (2), and I repeat that the true test is whether the continued disability is due to the accident or to the man's unreasonableness in refusing to submit to the operation. In my view the learned judge was right in arriving at the conclusion at which he did arrive, and this appeal must be dismissed with costs.

FLETCHER MOULTON L.J. I am of the same opinion. The law on this point was laid down by this Court in *Warncken* v. *R. Moreland & Son, Ld.* (2), and I do not think that the Court has since departed from it. The Master of the Rolls has read a passage from his judgment in that case which formulates what I may call the critical issue. I will take the passage in my judgment which formulates that issue, because apparently it is suggested that something in a judgment which I delivered in a later case deviates from the standard there laid down. I put it in this way (3): "If the incapacity, or the continuance of the incapacity after a certain time, is due to the fact that" the workman "has not behaved reasonably, then the continuing incapacity is not a consequence of the accident, but a consequence of his own unreasonableness." That appears to me to be the question to be decided in all these cases. Then came the case of *Tutton* v. *Owners of Steamship Majestic.* (1) That was an appeal from a judgment in which the learned county court judge had found that it was unreasonable to refuse to undergo the operation, and that the not undergoing the operation had prevented the man from recovering from the accident. He came to the conclusion that in two months the man would have been cured had he consented to have the operation performed. Accordingly he only granted compensation for those two months. When the evidence was examined it was obvious that, so far as the man was concerned, there was no unreasonableness in his conduct. His own doctor advised him not to have the operation. The evidence which persuaded the learned county court judge that it was unreasonable to refuse to have the operation was that there was a preponderance of medical testimony to the effect that in our

(1) [1909] 2 K. B. 54. (2) [1909] 1 K. B. 184.

(3) [1909] 1 K. B. at p. 189.

present state of medical science such an operation was in fact reasonable. We adhered absolutely to the law as laid down in *Warncken* v. *R. Moreland & Son, Ld.* (1), but we decided that the issue was not the abstract reasonableness of the operation, but the reasonableness of the man in refusing. In *Warncken's Case* (1) the continued disability was not due to the accident at all, but was due to the man's own unreasonableness in refusing to undergo the operation, and we laid down that this is what has to be proved. Accordingly when I came to deliver judgment in *Tutton's Case* (2) I said "I am of the same opinion and for the same reasons," so that I adopted the whole of what the Master of the Rolls had said. I then go on to say, "Here it appears to me that the learned county court judge has confused two totally different issues, one, if I may so call it, the unreasonableness of the operation, and the other the unreasonableness of the man. Now it is clear that all the medical evidence given by persons who had never seen the man before they saw him for the purpose of giving their evidence as to the reasonableness of the operation would be absolutely irrelevant upon the question of the reasonableness of the man." That was the only point which was before us in *Tutton's Case* (2), and we allowed the appeal because, although the learned judge had come to the conclusion that the operation would have prevented the incapacity, he came to that conclusion on evidence which did not shew that the man was unreasonable, but only that the operation was reasonable. The whole of my judgment is devoted to calling attention to the difference between those two issues; and I say in conclusion, "The real issue, as I have said, is the reasonableness of the man, and as to that I have no doubt that we ought to hold that the man acted reasonably." I was not throwing any doubt on its being necessary to shew that the continued incapacity was due to this unreasonableness. That was taken for granted throughout our judgments. All that I was pointing out was that the reasonableness is not the abstract reasonableness of the operation, but the reasonableness of the conduct of the man. For these reasons I am of opinion that this case is completely covered by authority. Prima facie the accident was the cause of the loss of the finger. If the

(1) [1909] 1 K. B. 184. (2) [1909] 2 K. B. 54.

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owners could have shewn that the loss of the finger was not due to the accident, but was due to the unreasonableness of the man in refusing to submit to the operation—a refusal found to be unreasonable—they would have succeeded, but they have failed to prove that. Therefore the award of compensation is good.

FARWELL L.J. I have come to the same conclusion. I think that the proposition which all the judges in this Court have laid down, that the question is whether the continuance of the incapacity is the consequence of the accident or of the unreasonableness of the man in refusing to submit to the operation, has to be analysed a little further. Take the present case. Was the loss of the finger the consequence of the accident, or was it the consequence of blood poisoning extending further up the arm due to the neglect or omission to lance or probe; and if the latter, then a further question arises, was that omission due to the unreasonableness of the workman; and until that second question—which is of course one, in a case like the present, of expert opinion and expert evidence—is answered in the affirmative, it appears to me that the third question of unreasonableness does not arise. That gets rid of the difficulty I felt at one time, that I thought it possible that the finding of unreasonableness might involve in itself the finding that there was the probability of recovery which is referred to by Lord M'Laren. But until it is shewn that the loss of the finger was due to the omission to lance or probe, it appears to me that no question whether it was reasonable or unreasonable for the workman to submit to it arises at all; because, unless it was reasonably clear that he would recover, it makes no difference, so far as the loss of the finger is concerned, whether the man refused to have the operation or not. It cannot be said that the refusal caused the loss of the finger, because it is not shewn that the treatment would have saved it.

Appeal dismissed.

Solicitors: *Botterell & Roche; T. A. Capron & Co., Grays.*

H. B. H.

[IN THE COURT OF APPEAL.]

C. A.
1909
Nov. 10.

WALKER *v.* THE CRYSTAL PALACE FOOTBALL CLUB, LIMITED.

Employer and Workman—Compensation—Workman—Professional Football Player—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 13.

The applicant, a professional football player, had entered into a written agreement to serve the respondents for one year at a weekly wage by playing football with the respondents' team when required and attend regularly to training and observe the training and general instructions of the club. The training regulations required the players to attend at the ground every day at 10.30 and to be under the orders of the trainer for the day. The applicant met with an accident while playing in a match. The respondents paid him his wages to the end of the year, and he then claimed compensation for permanent incapacity:—

Held, that the applicant was a "workman" within the meaning of the Workmen's Compensation Act, 1906.

Appeal from an award of the Croydon county court judge under the Workmen's Compensation Act, 1906.

The Crystal Palace Football Club was a limited company registered under the Companies Acts for the purpose of promoting the game of football by forming teams, either amateur or professional, to play the game. The club was affiliated with and subject to the rules and regulations of the Football Association. It was carried on for profit, but by the rules of the association was not allowed to pay a dividend of more than 5 per cent.

On April 20, 1908, the club engaged Walker to play football with the club for one year at a wage of 3*l.* 10*s.* per week by an agreement in the following terms:—

"1. The club hereby agrees to engage the said G. Walker from the first day of May one thousand nine hundred and eight until the 30th day of April one thousand nine hundred and nine for the purpose of playing football with the Crystal Palace Football Club Limited provided always and it is hereby agreed and declared that the said G. Walker shall not during the period aforesaid engage himself in the business of a publican or in any business connected with public-houses or reside in a public-house or upon

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any licensed premises or take part in professional running or any other sport without the consent in writing of the club.

"2. The said G. Walker hereby agrees to serve the club for the purpose and period aforesaid, and not to engage himself to play football for any other person or club during the said period, and at the expiration of this agreement the club shall have his first offer to enter into a further engagement upon such terms as he would be willing to enter into with any other club or person.

"3. In consideration of such services the club hereby agrees to pay the said G. Walker the sum of 3*l*. 10*s*. 0*d*. per week (three pounds ten shillings). The said G. Walker hereby agrees with the club that he will during the period aforesaid play in all matches when required by the club and will keep himself temperate, sober, and in good playing form and attend regularly to training and observe the training and general instructions of the club and do all that may by the club be deemed necessary to fit himself as an efficient football player and will in all respects conform to the rules and laws of the Football Association.

"And if the said G. Walker shall refuse or neglect to play in club matches when required as aforesaid or if he shall refuse or neglect to obey the training and general instructions of the club he shall pay to the club a sum not exceeding five pounds as liquidated damages for every such refusal or neglect, the club to have the power of suspension for any period the directors may determine."

The training regulations which were printed provided that "all players whose time is wholly engaged by the club shall attend at the ground or such other place as the directors may appoint at 10.30 every morning (match days excepted) and shall be under the orders of the trainer for the rest of the day," and contained other specific directions as to the conduct of the players. Players were allowed, with the consent of the secretary, to engage in other employments, but Walker had not been so engaged. The training season began in August, but actual play did not begin until October 1. Walker attended training according to the rules and played in some matches. On October 17 he injured his knee during a match and was incapacitated from

playing. The club paid his wages up to April 30, 1909, but did not re-engage him. He then applied for compensation on the ground that he was permanently incapacitated from earning wages in any suitable employment. The county court judge held that the plaintiff was a workman within the Act and granted compensation.

The club appealed.

C. A. Russell, K.C., and *B. Campion*, for the club. The applicant is not a workman within the meaning of the Act. The definition is "any person who has entered into or worked under a contract of service or apprenticeship with an employer whether by way of manual labour, clerical work or otherwise." The Act requires a contract of service. It is difficult to find a definition of the relation of master and servant. In Macdonell's Master and Servant, 2nd ed. pp. 7 to 11, there are set out five pages of attempted definitions. But it is an essential point that the master should have power to direct how the work should be done. In *Yewens* v. *Noakes* (1) Bramwell L.J. defines servant as "a person subject to the command of his master as to the manner in which he shall do his work." These players are engaged to exhibit their skill in playing football. The control of the club only extends to saying whether each man is to play or not. The manner in which he plays the game is left to his own skill and judgment. There are some elaborate directions about training, but these cannot make the respondent a servant any more than elaborate provisions as to the carrying out of a building or engineering contract could make the contractor a servant. Employment is not always service within the Act, though service implies employment. A person employed at the Franco-British Exhibition to lecture about an exhibit was held not to be a workman (2), though there was employment, and lecturing was work in a sense. The game of football which the applicant was hired to exhibit is a sport or pastime, not work.

Montague Shearman, K.C., and *W. H. Shawcross*, for the

(1) (1880) 6 Q. B. D. 530, 532.

(2) *Waites* v. *Franco-British Exhibition*, (1909) 25 Times L. R. 441.

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applicant. If this contract is looked at as a whole it is clear that the player is under control for his whole time and is doing bodily labour. While the game is being played he is under the control of the captain.

[They were stopped by the Court.]

COZENS-HARDY M.R. The question in this appeal is whether the particular respondent here, who has been party to a written form of agreement, is a workman entitled to compensation under the Workmen's Compensation Act.

The man in question is a professional football player. The present appellants are the Crystal Palace Football and Athletic Club, Limited. Amongst their objects as provided by the memorandum of association is this: "To promote the game of football and to establish games and to maintain a team of football players either professional or amateur or partly of the one and partly the other." The appellants are a limited company carrying on the business prescribed in the memorandum of association for profit. As I have already indicated, I do not think the element of profit is in any way essential, but in considering whether the relation of master and servant is in existence it may sometimes be important to have regard to the fact that the so-called master is carrying on a business for profit.

Now, that being the relation between the parties, the agreement is in these terms: "The club hereby agrees to engage the said G. Walker from the first day of May one thousand nine hundred and eight until the 30th day of April one thousand nine hundred and nine for the purpose of playing football with the Crystal Palace Football Club Limited provided always and it is hereby agreed and declared that the said G. Walker shall not . . . ;" and then there is a limitation that the man shall not be a publican or reside in a public-house or take part in professional running or any other sport without the consent in writing of the club. First of all the club agrees to engage the man. Then what does the man do? "The said G. Walker hereby agrees to serve the club for the purpose and period aforesaid and not to engage himself to play football for any other person or club during the said period," and at the expiration of that period the club is to have

the first offer to re-engage his services. Then in consideration of such service the club agrees to pay the man so much per week, and the man agrees that he will during the period aforesaid "play in all matches when required by the club and will keep himself temperate, sober, and in good playing form and attend regularly to training and observe the training and general instructions of the club and do all that may by the club be deemed necessary to fit himself as an efficient football player and will in all respects conform to the rules and laws of the Football Association." Then there is a proviso that if the man refuses or neglects "to play in club matches when required as aforesaid or if he shall refuse or neglect to obey the training and general instructions of the club he shall pay to the club a sum not exceeding five pounds as liquidated damages."

Before going further it is right to say that the regulations or instructions there referred to are also in print, and it is quite clear, without going through those regulations in detail, that the man agrees to devote his whole time, to attend regularly on certain days and hours, not merely for the purpose of playing, but for the purpose of training, and there are a number of detailed regulations which the man is bound to observe and comply with. That being conceded, we have to consider, not whether this man is a "workman" in the ordinary sense in which that word would be used in conversation in the street, without any reference to the provisions of this Act, but is he or is he not a "workman" within the definition which is found in s. 13? That section first of all says what it does not include. It "does not include any person employed otherwise than by way of manual labour whose remuneration exceeds two hundred and fifty pounds a year, or a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business, or a member of a police force, or an out-worker, or a member of the employer's family dwelling in his house, but, save as aforesaid, means any person who has entered into, or works under, a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work, or otherwise, and whether the contract is expressed or implied, is oral or in writing."

That being the present state of the law, without attempting to

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discuss, or even to consider, some of the cases which Mr. Russell has suggested may give rise to difficulty, I feel myself quite unable to entertain any doubt that this man has entered into a contract of service with the club. I think it was a contract by way of manual labour, but, whether it was so or not, I think it is a contract which plainly comes within those words "or otherwise," and that we should be narrowing the Act most unduly if we were to say this man was not entitled to get compensation as the result of the accident.

It has been argued before us very forcibly by Mr. Russell that there is a certain difference between an ordinary workman and a man who contracts to exhibit and employ his skill where the employer would have no right to dictate to him in the exercise of that skill; e.g., the club in this case would have no right to dictate to him how he should play football. I am unable to follow that. He is bound according to the express terms of his contract to obey all general directions of the club, and I think in any particular game in which he was engaged he would also be bound to obey the particular instructions of the captain or whoever it might be who was the delegate of the authority of the club for the purpose of giving those instructions. In my judgment it cannot be that a man is taken out of the operation of the Act simply because in doing a particular kind of work which he is employed to do, and in doing which he obeys general instructions, he also exercises his own judgment uncontrolled by anybody. I think this appeal must be dismissed.

FLETCHER MOULTON L.J. I am of the same opinion. I cannot see any reasonable room to doubt that a professional football player employed as this man was is within the terms of the Act. Here is a company that carries on the game of football as a trade, getting up and taking part in football matches. In order to share in the proceeds of those matches they must, of course, have a team which they can send to represent them in the games. This they obtain by entering into contracts of service with definite persons who are called professional football players, and who, in the language of the Master of the Rolls, give up their time for the purpose. Now I ask myself why is such a

contract, which is in its form a contract of service, not to be regarded by us as such? I can see no reason; and with regard to its not coming within the words "manual labour, clerical work, or otherwise," I think that it might fairly come, as the Master of the Rolls has said, under the term "manual labour," and certainly it comes under the more general words "or otherwise." I think therefore the judgment of the learned county court judge is right.

FARWELL L.J. I agree.

The appellants have made two points. They first of all say there is no contract of service with an employer because the football player is at liberty to exercise his own initiative in playing the game. That appears to me to be no answer. There are many employments in which the workman exercises initiative, but he may or may not be bound to obey the directions of his employer when given to him. If he has no duty to obey them, it may very well be that there is no service, but here not only is the agreement by the player that he will serve, but he also agrees to obey the training and general instructions of the club. I cannot doubt that he is bound to obey any directions which the captain, as the delegate of the club, may give him during the course of the game—that is to say, any direction that is within the terms of his employment as a football player.

The other point taken is that he is not a "workman" within the Act. It appears to me that it is impossible for the Court to consider the practical utility of the service or work performed. It may be sport to the amateur, but to a man who is paid for it and makes his living thereby it is his work. I cannot assent to the proposition that sport and work are mutually exclusive terms, or hold that the man who is employed and paid to assist in something that is known as sport is, therefore, necessarily excluded from the definition of workman within the meaning of the Act. I put during the argument the case of the huntsman and whips of a pack of hounds. The rest of the field ride for their own amusement, but the three I have mentioned are employed by and obey the orders of the master, and risk their

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necks, not entirely for their own amusement, but because they are paid to do it.

Appeal dismissed.

Solicitors: *S. Price & Sons, for Daniell & Price, Wolverhampton; Chas. A. W. Osborne, for Thomas Henry Hinchcliffe, Manchester.*

J. R. B.

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Oct. 18.

ROBINSON *v.* HILL.

Master and Servant—Unlawful Employment of Children—Contract between Employer and Child—Engagement of Child by Servant of Employer—Liability of Employer—Employment of Children Act, 1903 (3 *Edw.* 7, *c.* 45), *s.* 3, *sub-s.* 1; *s.* 5, *sub-s.* 1; *s.* 6, *sub-s.* 3.

By a by-law made under s. 3, sub-s. 1, of the Employment of Children Act, 1903, no child shall be employed between certain hours; and by s. 6, sub-s. 3, of the Act, "where an employer is charged" with any offence under the Act he shall be entitled upon information laid by him to have the person whom he charges as the actual offender brought before the Court, and if "after the commission of the offence has been proved" the Court is satisfied that the employer had used due diligence to comply with the provisions of the Act, and that the other person had committed the offence in question without the employer's knowledge, consent, or connivance, the other person shall be summarily convicted of the offence, and the employer shall be exempt from any fine.

A vanman in the employment of the respondent, a baker, employed for his own convenience and benefit a child to deliver bread to the respondent's customers during hours forbidden by the by-law. The child was actually engaged and his wages paid by the vanman, and his engagement was a voluntary and gratuitous act on the part of the vanman and formed no part of any arrangement between him and the respondent. The respondent had no knowledge that the child was so employed except during permitted hours.

The respondent was charged with having unlawfully employed the child during prohibited hours contrary to the by-law:—

Held, (1.) that the mere fact that the respondent was charged with the offence did not, in the absence of any evidence of a contract of employment of the child during prohibited hours by or on behalf of the respondent, make it incumbent upon him, under s. 6, sub-s. 3, of the Act, in order to claim exemption from a fine, to charge the vanman as the actual offender; (2.) that as there was no evidence of any unlawful

employment of the child by the respondent, either directly or by an agent purporting to employ the child on his behalf, no offence by the respondent had been proved.

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CASE stated by justices for the county of Middlesex.

An information was preferred by the appellant Robinson, an inspector for the county of Middlesex, under a by-law made by the Middlesex County Council in pursuance of the Employment of Children Act, 1903, charging the respondent George Hill with having on April 23, 1909, unlawfully employed between 8.30 A.M. and 5 P.M. Frank Thame, a child liable to attend school full time, on a day when the school attended by the child was open, contrary to the Act of 1903 and the by-law.

At the hearing before the justices the following facts were admitted or proved. Frank Thame was at the time in question thirteen and a half years of age and liable to attend school full time; his school was open on Friday, April 23, 1909, and on that day he was working between 8.30 A.M. and 5 P.M. The respondent and his two brothers carried on business as bakers at Station Road, Wealdstone, and at the time in question Frank Thame was employed in delivering bread for one Percy Smurthwaite to the respondent's customers. Frank Thame was actually engaged and his wages paid by Smurthwaite, a vanman in the employment of the respondent, for Smurthwaite's convenience and benefit. The engagement of Thame was a voluntary and gratuitous act on the part of Smurthwaite and formed no part whatever of any arrangement between the respondent and Smurthwaite. The respondent knew that Thame was so employed to deliver the respondent's bread to the respondent's customers, but only during permitted hours.

By the Employment of Children Act, 1903, s. 3, sub-s. 1, "A child shall not be employed between the hours of nine in the evening and six in the morning: Provided that any local authority may, by by-law, vary these hours either generally or for any specified occupation."

Sect. 5, sub-s. 1: "If any person employs a child . . . . in contravention of this Act or of any by-law under this Act, he shall be liable on summary conviction" to a fine.

Sect. 6, sub-s. 3: "Where an employer is charged with any

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offence under this Act, he shall be entitled, upon information duly laid by him, to have any other person whom he charges as the actual offender brought before the Court at the time appointed for hearing the charge, and if, after the commission of the offence has been proved, the Court is satisfied that the employer had used due diligence to comply with the provisions of the Act, and that the other person had committed the offence in question without the employer's knowledge, consent or connivance, the other person shall be summarily convicted of the offence, and the employer shall be exempt from any fine."

Sect. 13. "In this Act—The expression 'child' means a person under the age of fourteen years."

The by-law was as follows: "No child liable to attend school full time shall be employed on days when the school is open for more than three and a half hours a day; nor (*a*) between 8.30 A.M. and 5 P.M.; (*b*) before 6 A.M. or after 9 P.M."

The appellant contended (*a*) that the respondent had committed an offence under the by-law and statute; (*b*) that the respondent was, on a proper construction of the Act and by-law, the employer of Frank Thame; (*c*) that as no information had been laid by the respondent under s. 6, sub-s. 3, of the Act, he was, under the Act and by-law, liable in respect of the offence proved. The respondent contended that he was not, either in fact or in law, the employer of Frank Thame.

The justices were of opinion that, upon the evidence and upon a proper construction of the Act of 1903 and the by-law, the respondent was not, either in fact or in law, the employer of Frank Thame, and they dismissed the information.

Eustace Hills, for the appellant. The employment of the boy by Smurthwaite to carry the respondent's bread constituted the respondent his employer within the meaning of s. 6 of the Employment of Children Act, 1903. It is true that Smurthwaite employed the boy for his own convenience and not on behalf of his master. But that is immaterial. Sub-contracting by the servant was the very thing that s. 6 was designed to meet. In *Collman* v. *Mills* (1) the respondent's servant, in his absence and

(1) [1897] 1 Q. B. 396.

contrary to his express orders, in breach of a by-law slaughtered a sheep in the presence of other sheep. It was contended that, as the act of the servant was not to the advantage of the respondent, the latter ought not to be held criminally responsible, but the Court overruled that contention.

Then if the respondent was the boy's employer he was prima facie responsible. Sect. 6, sub-s. 3 expressly contemplates an employer being held liable even though he had no knowledge of his agent's act, but it affords him a means of excusing himself, namely, that of taking proceedings against the agent; and here the respondent has not chosen to avail himself of that protection.

J. Penry Oliver, for the respondent. There has been no contravention by the respondent of the provisions of the Employment of Children Act, 1903, or the by-law. Some employment by the respondent of the child must be proved. In the present case there was no evidence of any contract of employment between the respondent and the child.

LORD ALVERSTONE C.J. This case raises a question of some difficulty. I am anxious that it should not be thought from anything I say that I am of opinion that a narrow construction ought to be placed upon this very useful Act. The justices decided that there was no evidence of an offence by the master, and I have come to the conclusion that that was a right decision. The Employment of Children Act, 1903, contemplates that there shall be an employment by the master. That employment might either be brought about by a direct contract between the master and the child, in which case the master would come within the provisions of the Act, or the employment might be brought about by an agent of the master, and although the agent had wrongfully and without authority purported to employ the child on behalf of the master, I think, as at present advised, that the case would be within the section. In that case there would be a taking of the child into employment by the master in contravention of the Act. That is why s. 6, sub-s. 3, was enacted. But, in my judgment, in order to bring the case within the statute there must purport to be some employment by or on behalf of the master. On behalf of the appellant it was contended that that is

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Lord Alverstone C.J.

negatived by the opening words of s. 6, sub-s. 3. No doubt those words afford some ground for the contention that the mere bringing of a charge alleging that the child was employed by the master would be enough to impose a duty on the employer to bring the actual defendant before the Court. But that prima facie view of the meaning of the sub-section is negatived by the subsequent words "after the commission of the offence has been proved." There must purport to exist on the facts a contract of employment between the child and the employer. In this case, upon the facts, it is obvious that there is nothing of the kind. The master had no knowledge of any employment of the child in contravention of the section. All he knew was that the child was being employed during permitted hours. There is therefore no evidence of a contract of employment of the child by or on behalf of the master during prohibited hours, and the decision of the justices was right.

DARLING J. I agree.

BUCKNILL J. I also agree.

Appeal dismissed.

Solicitor for appellant: *Sir Richard Nicholson.*
Solicitors for respondent: *Godfrey, Robertson & Best.*

J. E. A.

GUNDRY *v.* SAINSBURY.

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Oct. 28.

Solicitor and Client—Verbal Agreement as to Costs—No Costs payable by Client—Right to recover from another Person—Attorneys and Solicitors Act, 1870 (33 & 34 *Vict. c.* 28), *ss.* 4, 5.

A solicitor, who was acting for a client in a county court action in which the client was plaintiff, verbally agreed with him that he should not pay the solicitor any costs. At the trial of the action the jury returned a verdict for the plaintiff with damages. The county court judge, on the application of the defendant, entered judgment for the plaintiff for the amount of the verdict without costs, on the ground that under s. 5 of the Attorneys and Solicitors Act, 1870, the plaintiff was not entitled to recover from the defendant more costs than were payable by the plaintiff to his solicitor under the agreement:—

Held, that the fact that the agreement was not in writing did not prevent the application of s. 5, and that the county court judge had rightly entered judgment for the plaintiff without costs.

Appeal from the Wandsworth County Court.

The action was brought to recover damages for injuries alleged to have been sustained by the plaintiff through having been bitten by the defendant's dog. The plaintiff, who was a labourer, gave evidence at the trial, and in the course of cross-examination he stated, in answer to a question by the defendant's counsel, that he could not pay costs, and that he had arranged with his solicitor not to pay costs of the action. The jury found for the plaintiff with damages 15*l.* Counsel for the defendant thereupon asked the county court judge to enter judgment for the plaintiff for 15*l.* without costs, on the ground that there being, according to the plaintiff's evidence, an agreement between the plaintiff and his solicitor that the plaintiff should pay the solicitor no costs, the plaintiff was under the proviso to s. 5 of the Attorneys and Solicitors Act, 1870 (1), not entitled to

(1) Attorneys and Solicitors Act, 1870 (33 & 34 Vict. c. 28), s. 4: "An attorney or solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges, or disbursements in respect of business done or to be done by such attorney or solicitor, whether as an attorney or solicitor or as an advocate or conveyancer, either by a gross sum, or by commission or percentage, or by salary or otherwise, and either at the same or at a greater or at a less

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recover from the defendant more costs than were payable by the plaintiff to his solicitor under the agreement, and that was nothing. The county court judge adjourned the further argument of this question to a later day, when it was contended for the plaintiff that, as the agreement was verbal, the proviso to s. 5 had no application. The county court judge reserved his decision, and on the day appointed by him for the delivery of his judgment an application was made to him by counsel for the plaintiff that the solicitor of the plaintiff be allowed to give evidence as to the terms on which he had agreed to act for the plaintiff. This was opposed by counsel for the defendant on the ground that the arguments had been concluded on the former occasion, and the county court judge declined to allow the solicitor to give evidence. He found as a fact that there was a verbal agreement between the plaintiff and his solicitor that the plaintiff should not pay the solicitor any costs, and he gave judgment for the plaintiff for 15*l.* without costs, holding, on the authority of *Clare* v. *Joseph* (1), that for the purpose of applying the proviso to s. 5 of the Act the agreement need not be in writing.

The plaintiff appealed.

Moyses, for the plaintiff. The county court judge was wrong in holding that he had power under s. 5 of the Act of 1870 to deprive the plaintiff of costs. His judgment was based on a misconception of what was decided in *Clare* v. *Joseph*. (1) That case turned entirely on s. 4 and decided that although s. 4 speaks of an agreement in writing, yet, if a client is setting up against

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rate as or than the rate at which he would otherwise be entitled to be remunerated . . . ."

Sect. 5: "Such an agreement shall not affect the amount of, or any rights or remedies for the recovery of, any costs recoverable from the client by any other person, or payable to the client by any other person, and any such other person may require any costs payable or recoverable by him to or from the client to be taxed according to the rules for the time being in force for the taxation of such costs, unless such person has otherwise agreed: Provided always, that the client who has entered into such agreement shall not be entitled to recover from any other person under any order for the payment of any costs which are the subject of such agreement more than the amount payable by the client to his own attorney or solicitor under the same."

(1) [1907] 2 K. B. 369.

his solicitor an agreement by the solicitor to accept less than the usual remuneration, the solicitor cannot by way of defence rely on the fact that the agreement is not in writing. *Clare* v. *Joseph* (1) has, therefore, no bearing on the question in the present case, which arises under the proviso to s. 5, and this is not a case of a client setting up an agreement against his solicitor to pay him no costs, for it is the defendant in the action who contends that under s. 5 the plaintiff is, by reason of this verbal agreement, deprived of his right to judgment with costs. Where the agreement to pay no costs is verbal the proviso to s. 5 does not apply, for the words "such agreement" in the proviso refer back to the words "an agreement in writing" in s. 4, and it is only in the one case dealt with in *Clare* v. *Joseph* (1) that the agreement need not be in writing. Further, there was no real evidence on which the county court judge could find as a fact that there was such a verbal agreement between the plaintiff and his solicitor as is relied on by the defendant. The only suggested evidence was an answer given by the plaintiff in cross-examination at the trial, and when the solicitor tendered himself as a witness the county court judge declined to hear him. In both *Clare* v. *Joseph* (1) and *Jennings* v. *Johnson* (2) the question as to the existence of the alleged agreement was tried as a separate issue between the client and the solicitor as opposing parties, and that course ought to have been followed in this case, before the defendant was allowed to ask the Court to put in force the disabling provisions of s. 5.

Ricardo, for the defendant, was not called upon to argue.

DARLING J. This is an appeal by the plaintiff from a decision of a county court judge giving judgment for the amount of the damages awarded by the jury, but without costs, on the ground that there was a verbal agreement between the plaintiff and his solicitor that the plaintiff should not pay him any costs, and that under the proviso to s. 5 of the Attorneys and Solicitors Act, 1870, the plaintiff was therefore not entitled to recover from the defendant more costs than the plaintiff was liable under the agreement to pay his solicitor. I am of opinion that there

(1) [1907] 2 K. B. 369. (2) (1873) L. R. 8 C. P. 425.

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Darling J.

was evidence which, if believed by the county court judge, justified him in finding as a fact that there was an agreement such as I have stated between the plaintiff and his solicitor, for the plaintiff, in the course of his cross-examination at the trial, stated in plain terms that he had arranged with his solicitor not to pay him any costs. The jury gave a verdict for the plaintiff, and the point was then raised by counsel for the defendant that, there being this agreement that the plaintiff should pay no costs, s. 5 of the Act prevented him from recovering any costs from the defendant. The judge adjourned the case for further argument of that point, and on a later day counsel appeared before him and argued the matter, but no further evidence as to the terms of the agreement was given, and no application was made for a further adjournment in order that evidence might be given to shew that the statement made by the plaintiff as to the agreement was incorrect. The judge, after hearing arguments on both sides, reserved his decision, and subsequently appointed April 26 as the day on which he would deliver his judgment. On that day, before the judgment was delivered, counsel for the plaintiff applied to the judge for leave to call the plaintiff's solicitor as a witness. It was a matter entirely within the discretion of the judge whether he would at that stage allow the case to be re-opened, and in the exercise of his discretion he declined to allow it, and he then delivered his judgment, holding that in the circumstances the plaintiff was not entitled to recover any costs from the defendant.

I have come to the conclusion that the judgment was right. The effect of a verbal agreement as to costs between a client and his solicitor was considered in *Clare* v. *Joseph* (1), in which case the Court of Appeal overruled a decision of Ridley J. and myself and held that an agreement by a solicitor with a client to charge him nothing for costs is not an agreement which is required by the Attorneys and Solicitors Act, 1870, to be in writing. The true view of the statute is very neatly stated by Buckley L.J. at the end of his judgment where he said: "The effect of s. 4 is, I think, that whether the solicitor is to have remuneration at a greater or a less rate than the ordinary rate, an agreement

(1) [1907] 2 K. B. 369.

between him and his client to that effect must be in writing, if the solicitor sets it up. If the client is setting it up, none of the considerations with which I have been dealing have any bearing. Before the Act of 1870 the solicitor was bound by such an agreement as the present one; that Act was wanted, not for the protection of the client, but for the benefit of the solicitor in order to relieve him of the disability with which he was affected. Sect. 4 does not empower the client to do anything which he could not do before, but does empower the solicitor, provided he complies with the conditions imposed, to enter into a contract with his client which, prior to that statute, he could not have entered into. The solicitor here, as the jury found, has entered into a verbal agreement to take remuneration at a less rate than he would otherwise have been entitled to charge, and he cannot, I think, set up the defence that the agreement is not binding upon him because it is not in writing."

That is the very contention that has been put forward in this case, for although the judgment for costs would in form be a judgment that the plaintiff do recover costs, yet the substance of the matter is that it is the plaintiff's solicitor who is seeking to recover these costs, and it is he who is really saying that the agreement is not binding on him because it is not in writing; but that is what Buckley L.J. expressly says the solicitor cannot do. I therefore come to the conclusion that this agreement, although not in writing, is one to which the proviso to s. 5 applies. There is only one other matter to notice. The agreements dealt with in ss. 4 and 5 of the Act are agreements by which the client is to pay the solicitor "at a greater or a less rate than the rate at which he would otherwise be entitled to be remunerated." In this case the agreement was not one to pay the solicitor less than the ordinary remuneration, but not to pay him anything at all. It cannot, I think, be denied that a payment of nothing is a payment at less than the ordinary rate. It would be hypercriticism to say that an agreement not to pay anything is not equally well described as an agreement to pay nothing; just as a man may be said to "do nothing" or to "want nothing," in the sense that he does not do or want anything. Therefore, the plaintiff not being liable to pay any

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costs to his solicitor, the defendant is not liable to pay any to the plaintiff.

For these reasons I am of opinion that the appeal must be dismissed.

BUCKNILL J. I agree. Before the Act of 1870 an agreement by a solicitor with his client to accept less than the ordinary amount of remuneration was binding on the solicitor although it was not in writing, and, as was pointed out by the Court of Appeal in *Clare* v. *Joseph* (1), the object of s. 4 was not to deprive the client of his existing rights, but to confer a benefit upon the solicitor, and the Court held that the necessity for a special agreement as to costs being in writing only arose when the solicitor was setting up the agreement against the client. But then Mr. Moyses says, admitting that to be so, when one comes to consider s. 5 one finds the words "such agreement," and those words, he contends, must refer to the words "an agreement in writing" in s. 4, with the result that the proviso to s. 5 is inoperative unless the agreement by the client to pay his solicitor less than the ordinary amount of costs is in writing. I do not think that is a sound argument. I think the language of s. 5 must receive the same interpretation as that of s. 4, and that the words "such an agreement" in s. 5 only mean an agreement in writing when the solicitor is seeking to take advantage of it. That is not the case here, and, therefore, although the agreement was not in writing, the proviso to s. 5 applies, and the plaintiff is not entitled to recover any costs from the defendant.

I entirely agree with what Darling J. has said as to there being evidence on which the county court judge could find that there was in fact an agreement between the plaintiff and his solicitor by which the plaintiff was not to be liable for any costs.

Appeal dismissed.

Solicitor for plaintiff: *C. F. Appleton.*
Solicitor for defendant: *L. Tubbs.*

(1) [1907] 2 K. B. 369.

F. O. R.

THE GUARDIANS OF THE POOR OF ST. MARY, ISLINGTON *v.* BIGGENDEN.

1909
Oct. 26.

Poor Law—Maintenance of Pauper—Right of Guardians to recover Expenses of Maintenance—Principle upon which Expenses are recoverable.

A pauper who has been maintained by the guardians of a poor law union in their infirmary is liable to pay to the guardians a reasonable sum for the necessaries supplied to him. Such necessaries include not only a reasonable sum for the food, clothing, drugs, coal, gas, and water supplied, but also a reasonable sum in respect of the pauper's share of the establishment expenses incurred for the purpose of keeping up the infirmary as a place of residence for the paupers, such as the salaries of the officers of the infirmary, and their rations and uniforms if supplied as part of the terms of their service, the cost of the furniture, of the painting, repairs, and insurance of the building, of timber and other building materials, and the cleaning of windows, the wages of certain workmen employed therein, a sum for printing and stationery, and the parochial rates payable in respect of the infirmary, and also a sum in respect of the capital cost of the site and building.

Special Case stated by consent in an action.

The plaintiffs claimed the sum of 251*l.* 19*s.* 7*d.*, being the balance alleged by the plaintiffs to be due to them in respect of expenses incurred by them at the request of the defendant in the maintenance of the defendant in their infirmary at Highgate Hill, Islington, London, the plaintiffs claiming the said sum by virtue of an implied contract or obligation upon the defendant to repay the same; and the parties concurred in stating the questions of law in a special case for the opinion of the Court:—

1. The defendant, who was seventy-three years of age, was on October 5, 1902, admitted into the plaintiffs' infirmary, situate at Highgate Hill, in the parish of St. Mary, Islington. The defendant at the time of his admission into the infirmary was suffering from sunstroke, and was then and had ever since continued to be in a physically helpless condition.

2. The defendant had since October 5, 1902, until the present date continuously been an inmate of the infirmary, and had been throughout that period (subject to the payment by him to the plaintiffs of the sum of 156*l.* hereinafter referred to) maintained at the sole expense of the plaintiffs.

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3. The total expenditure incurred by the plaintiffs in respect of the defendant for the period from October 5, 1902, to December 26, 1908 (such total expenditure being calculated upon the basis that the defendant and the other pauper inmates maintained in the infirmary during the said period should bear the whole of the actual expenditure of the plaintiffs in respect of the infirmary during the said period between them), was 407*l.* 19*s.* 7*d.* Particulars of this sum of 407*l.* 19*s.* 7*d.* were given in schedule A to the case. Such particulars shewed the weekly charges to the defendant during the said period under the headings of (A.) Maintenance; (B.) Salaries, &c., of Officers; (C.) Repairs and other Charges; and (D.) Loans and Interest.

4. The expenses incurred by the plaintiffs under the heading of "(A.) Maintenance" comprised the cost of (1.) provisions for the pauper inmates of the infirmary; (2.) necessaries for the infirmary, being soap, coals, gas, water, and the like; (3.) funerals; (4.) clothing. The expenses incurred by the plaintiffs under the heading of "(B.) Salaries, &c., of Officers" comprised the cost of (1.) salaries of officers of the infirmary; (2.) rations of the said officers; (3.) uniforms of the said officers. The expenses incurred by the plaintiffs under the heading of "(C.) Repairs and other Charges" comprised the cost of (1.) repairs, painting, and the like; (2.) timber and other building materials, engineers' and smiths' work, ironmongery, and cleaning windows; (3.) wages of carpenter, engineer, stokers, and temporary workmen; (4.) furniture; (5.) drugs; (6.) printing, stationers' books, advertisements, postages, and other small payments; (7.) insurance of infirmary; (8.) parochial rates payable in respect of the infirmary; (9.) rent of telephone. The expenses incurred by the plaintiffs under the heading "(D.) Loans and Interest" were expenses on account of the repayment of the loans referred to in paragraph 6 hereof.

5. The accounts of the plaintiffs relating to the infirmary were made up half-yearly. The half-yearly accounts were all in the same form and related to similar items of expense. Particulars of the accounts for the half-years ending Lady Day, 1908, and Michaelmas, 1908, respectively were given in schedule B to the case, and shewed the sums expended during

the said half-years in respect of the items specified in paragraph 4 hereof. (1)

6. The cost of the site for the infirmary was 53,000*l.* The cost of the infirmary buildings, including fittings and electric lighting, was 255,148*l.* 3*s.* 5*d.* These sums of 53,000*l.* and 255,148*l.* 3*s.* 5*d.* were raised as to 301,838*l.* 11*s.* 1*d.* by various loans. The balance of 6309*l.* 12*s.* 4*d.* was provided from the profit upon land which had been originally purchased by the plaintiffs for the purpose of an infirmary but was subsequently sold. The infirmary was built under the authority of orders of the Local Government Board, who authorized the expenditure upon the site and buildings and the raising of the loans above referred to.

7. The infirmary was built to accommodate 800 patients, and there had always been that number in the infirmary since the month of March, 1901, when it was opened. In attendance upon the patients there was a staff of medical officers and nurses. There were also other officers employed in connection with the infirmary, including stewards, porters, engineers and stokers, cooks, laundrywomen, and needlewomen. The officers of the infirmary were appointed with the sanction of the Local Government Board.

8. There were twenty-eight wards for the patients of the infirmary. There was also accommodation for the medical officers, nurses, and other officers. The infirmary contained kitchens, a laundry, and other buildings requisite for the needs of the infirmary.

9. On September 17, 1908, Emily Biggenden, spinster, a sister of the defendant, died intestate, and the defendant became entitled, as one of the next of kin of Emily Biggenden, to the sum of 269*l.* 5*s.* 8*d.*

10. On December 1, 1908, the defendant paid to the plaintiffs the sum of 156*l.* in respect of six years' maintenance at the rate of ten shillings per week, as a total sum which would be sufficient

(1) It is unnecessary to set out the accounts in schedules A or B, as the items were admitted by the defendant's counsel, for the purpose of this case, to be reasonable. The cost per inmate per week for the half-year ending Lady Day, 1908, was made out as 1*l.* 2*s.* 7*d.*, and for the half-year ending Michaelmas, 1908, as 1*l.* 5*s.* $1\frac{1}{4}$*d.*

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to cover the legal liability of the defendant to the plaintiffs. The payment by the defendant to the plaintiffs of this sum of 156*l.* was made without prejudice to this action.

11. The questions for the opinion of the Court were: (1.) In respect of which, or of which parts, of the several heads of expenditure enumerated in paragraph 3 hereof, as amplified by paragraph 4, might a lawful charge be made by the plaintiffs to the defendant? (2.) Whether, in the event of it being unlawful for the plaintiffs to make a charge to the defendant in respect of the item "(D.) Loans and Interest," the plaintiffs might make a lawful charge to the defendant in respect of the capital cost of the infirmary site and buildings.

12. It was agreed between the parties that, upon the determination of the questions for the opinion of the Court in paragraph 11 set forth, the sum of money which the plaintiffs might lawfully charge the defendant in respect of the items specified in paragraphs 3 and 4 for the period from October 5, 1902, to December 26, 1908, should be determined by the Court or in such manner as the Court might direct. It was further agreed that for the purpose of ascertaining such sum the account as shewn in schedule A, and the half-yearly accounts of the plaintiffs from October 5, 1902, to December 26, 1908, were correct. It was further agreed that, in the event of it being unlawful for the plaintiffs to make a charge to the defendant in respect of "(D.) Loans and Interest," but it being lawful for the plaintiffs to make a charge to the defendant in respect of the capital cost of the infirmary site and buildings, the charge to the defendant in respect of the capital cost of the infirmary site and buildings should be at the rate of 14*l.* 7*s.* 6*d.* per annum.

13. If the sum of money to be ascertained as in paragraph 12 provided should exceed the sum of 156*l.*, then judgment was to be entered for the plaintiffs for the excess, with costs of action. If the sum of money so ascertained should be less than the sum of 156*l.*, then judgment was to be entered for the defendant for the difference, with costs of defence.

Montague Shearman, K.C. (*Sydney Davey* with him), for the plaintiffs. There is a common law liability on the part of the

defendant to pay a reasonable sum for the expenses necessarily incurred by the plaintiffs in his maintenance: *In re Clabbon* (1); *Birkenhead Union* v. *Brookes.* (2) Formerly ten shillings a week was considered a reasonable sum to cover those expenses, but expenses have now increased, and the plaintiffs therefore desire to have the principle upon which they can recover the expenses laid down. The test is what is reasonably expended for the purpose of maintaining the defendant in this particular establishment, treating him as any other pauper is treated. A proportionate share of the sums actually expended upon the maintenance of the paupers in this establishment is the proper sum to be allowed for maintenance. The expenses of the guardians are duly audited, and therefore the sums actually expended upon the maintenance of the paupers must be considered as having been reasonably expended, unless it can be shewn that any particular item is unreasonable. The test is not what would be the reasonable cost of maintaining the pauper at some place outside the infirmary; the test is what is the reasonable cost of maintaining him in this particular infirmary. The amount actually expended by the guardians, which must be assumed to have been reasonably expended, is the test of liability. Sect. 16 of the Poor Law Amendment Act, 1849 (12 & 13 Vict. c. 103), which Farwell J. held in *In re Clabbon* (1) did not cut down the common law liability of a pauper to pay to the guardians of a union sums expended upon his maintenance for six years, but merely gave a special mode of recovering one year's maintenance in the case of the pauper having any money or valuable security for money, gives the guardians that remedy so as to reimburse them "for the amount expended by them . . . . in the relief of such pauper," and in the event of the death of the pauper it gives them power to reimburse themselves "the expenses incurred by them in and about the burial of such pauper and in and about the maintenance of such pauper at any time during the twelve months previous to the decease." That section merely declares the common law, and it affords an illustration as to what expenses the guardians may recover. In the Lunacy Act, 1890 (53 & 54 Vict. c. 5), the expenses of

(1) [1904] 2 Ch. 465. (2) (1906) 95 L. T. 359.

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maintaining a pauper lunatic are dealt with, and in ss. 283, 287, and 299 the expenses of maintenance include lodging and other incidental expenses. Applying that principle to the present case, the lodging provided for the paupers must be taken into account, including the expense of keeping up the infirmary as a suitable residence for the paupers. Coming to the various headings of claim, the items under the heading (A.) for "maintenance" are properly allowable, except the item for funerals, which it is not contended is payable. The items of expense under the heading (B.), salaries, rations, and uniforms of the officers of the infirmary, are properly included as part of the establishment expenses which have been allowed by the Local Government Board auditor. So also the items under the heading (C.) are necessary for keeping up the infirmary as a place of residence for the sick paupers. The rent of a telephone ought to be allowed, as it saves the cost of a messenger. As to the heading "(D.) Loans and Interest," the interest upon the moneys expended upon the site and building of the infirmary ought to be taken into consideration, and are properly allowable, as bearing some analogy to the rent payable for lodging accommodation. At any rate a sum is allowable in respect of the capital cost of the building, and 14*l.* 7*s.* 6*d.* has been arrived at as a reasonable sum. The plaintiffs are therefore entitled to recover.

Tindale Davis, for the defendant. The principle is laid down in the judgment of Farwell J. in *In re Clabbon* (1), where he adopted the statement by Fry L.J. in *West Ham Union* v. *Pearson* (2), that the common law liability of the pauper is "to repay the expenses necessarily incurred for the benefit of the defendant himself." That principle was followed in *Birkenhead Union* v. *Brookes* (3), which has no other bearing upon this case. The expenses therefore which are recoverable are only those expenses which have been incurred for the benefit of the defendant himself. The sums expended on the maintenance of the particular pauper, such as his food, clothing, drugs, coal, gas, and water, are recoverable. The cost of the lodging, that is,

(1) [1904] 2 Ch. 465. (2) (1890) 62 L. T. 638.
(3) (1906) 95 L. T. 359.

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the housing of the defendant, cannot be taken into account. No sum, therefore, can be recovered in respect of the building, which was not erected for the benefit of the defendant; it was erected under statutory authority, and the guardians were bound to erect it whether the defendant was ever received there or not, and his living in the infirmary did not increase the cost of erecting the building. The sum recoverable is the extra expense necessarily incurred in maintaining the defendant, not the expense incurred in maintaining the building. Under s. 287 of the Lunacy Act, 1890, "maintenance" of a pauper lunatic is distinguished from his "lodging." Again, the officers of the infirmary have to be there whether the defendant is there or not. The expense of their salaries, rations, and uniforms are quite independent of the defendant going into the infirmary. Nothing accordingly ought to be allowed in respect either of the building or of the officers, inasmuch as those items of expense were not incurred by the admission of the defendant to the infirmary. Therefore none of the items under the headings (B.), (C.), or (D.), except perhaps drugs, are allowable. The only items of expense recoverable are those under the heading (A.), with the exception of the expense of funerals. It is not contended that the various items in the plaintiffs' claim are unreasonable. It is admitted for the purposes of this case that they have been arrived at upon a proper basis, and so far as they are allowable the amounts are not disputed. [*In re Rhodes* (1) was also referred to.]

BRAY J. In my opinion the liability of the defendant is the same as the common law liability of a person, such as an infant or the like, who is not able to contract for necessaries supplied to him. The liability of such a person seems to me to have been laid down by Farwell J. in *In re Clabbon* (2) and by Fry L.J. and Mathew J. in *West Ham Union* v. *Pearson* (3), and was applied by Ridley and Darling JJ. in *Birkenhead Union* v. *Brookes* (4) to the case of a pauper who had capacity to contract. It seems to me to be clear that the legal liability is to pay a reasonable sum for the necessaries supplied. Whether or not

(1) (1890) 44 Ch. D. 94.
(2) [1904] 2 Ch. 465.
(3) 62 L. T. 638.
(4) 95 L. T. 359.

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Bray J.

that reasonable sum is the amount of the actual expenses which have been incurred it is not necessary for me to decide, and I think that I had better not express any opinion upon it, because counsel for the defendant has stated that he does not wish to challenge those expenses as being unreasonable. Therefore, the amount of the expenses being admitted to be reasonable, my duty is simply to decide which of the expenses under the various headings should be allowed as against the defendant.

I will take them in order. The first head of expense is "maintenance." Under that head provisions for the pauper inmates of the infirmary are clearly necessary for those inmates; and so also are soap, coals, gas, water, and the like, which are equally necessaries. A fair proportion of those things was, I assume, supplied to the defendant. The expenses of funerals I disallow, inasmuch as that is an item of expense from which the defendant cannot be said to have derived any benefit. Then with regard to clothing I think that the true criterion is the reasonable cost of the clothing which the pauper has actually had, but counsel for the defendant has said that that item is a small one, and that it is not worth incurring the expense of testing it. Therefore the amount claimed for the expenses of clothing will be allowed. Coming now to the heading (B.), it is clearly necessary, if there is to be an infirmary, that there should be officers to manage it. Their salaries are part of the ordinary establishment expenses, and as the reasonableness of the sums claimed for these expenses is not disputed, it becomes a mere matter of calculation as to the proportion chargeable to the defendant, and therefore that item must be allowed. If the officers get their rations free, the establishment expenses would necessarily include the expenses of their rations, and the same consideration will apply to their uniforms if they receive the uniforms as part of the terms of their service. Therefore the items under the heading (B.) must be allowed. Next, with regard to the expenses under the heading (C.), those expenses must be allowed in so far as they are establishment expenses. It has been strongly contended on behalf of the defendant that he is not liable for any lodging expenses upon the ground that

the lodging and its accessories were not provided specially for him, but were provided many years before for such persons as should come to the infirmary. In my opinion the defendant was provided with lodging, which was a necessary for him, and the plaintiffs are entitled to recover a reasonable sum in respect thereof. Again, I have not to inquire whether the expenses are reasonable, because it is admitted that they are; I have only to inquire whether they ought to be taken into account as forming part of the establishment expenses, a due proportion of which the plaintiffs are entitled to be paid for providing the defendant with lodging. Upon this basis it seems to me that "repairs, painting, and the like" must be allowed, as they are part of the lodging expenses. "Timber and other building materials," &c., and the cleaning of windows must also be allowed as coming within the same class of expenses; so must the "wages of carpenter," &c. The defendant was provided with lodging and furniture, and therefore the item for furniture must be allowed. If he was provided with drugs he must pay for them, but not otherwise; but that is a small matter, and it has not been challenged. With regard to the printing and stationery, there must of necessity be some printing and stationery in a large establishment of this kind, and as the reasonableness of the items is not disputed, they must be allowed as part of the establishment expenses. So too with "insurance of infirmary." It is reasonable that the guardians should insure as part of the lodging expenses. When a person agrees to pay a reasonable sum for lodging he must pay the reasonable expenses connected with the lodging, such as a proportion of the rent; and it seems to me that parochial rates payable in respect of the infirmary come within the same principle. With respect to the "rent of telephone," I have my doubts about allowing that expense. However, it is a very small item, and it is not worth discussing. Perhaps it had better be agreed that that item should come out. The last item is "loans and interest." In my opinion that is not the proper basis for calculating the reasonable sum for lodging. One way of calculating that is to arrive at the capital cost. That is very often a good criterion of the reasonable sum which ought to be paid in a case like this

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when there is no market price. It is an element to be taken into account, and as the amount claimed upon that footing, 14*l.* 7*s.* 6*d.*, is not challenged as being unreasonable, it must be allowed. There will therefore be judgment for the plaintiffs, and the parties will agree as to the exact amount.

The amount was subsequently agreed at 197*l.* 4*s.* 1*d.* beyond the sum of 156*l.* already paid by the defendant to the plaintiffs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Samuel Price & Sons.*
Solicitors for defendant: *Eyre, Dowling & Co.*

W. F. B.

C. A.

1909

Nov. 9.

[IN THE COURT OF APPEAL.]

In re AN ARBITRATION BETWEEN THE BRISTOL GAS COMPANY AND THE BRISTOL TRAMWAYS AND CARRIAGE COMPANY, LIMITED.

Tramway—Additional Expense imposed on Gas Company by reason of Existence of Tramway—Liability of Tramway Company—Interruption of Tramway Traffic by Work executed by Gas Company—Laying down, repairing, altering, or removing new Service Pipe—Repairing, altering, or removing Service Pipe or Main laid before Construction of Tramway—Connecting new Service Pipe with old Main—Tramways Act, 1870 (33 & 34 *Vict. c.* 78), *s.* 32, *sub-ss.* 2, 5.

By s. 32 of the Tramways Act, 1870, "Nothing in this Act shall take away or abridge any power to open or break up any road along or across which any tramway is laid, or any other power vested in any local authority or road authority for any of the purposes for which such authority is respectively constituted, or in any company, body, or person for the purpose of laying down, repairing, altering, or removing any pipe for the supply of gas or water, or any tubes, wires, or apparatus for telegraphic or other purposes, but in the exercise of such power every such local authority, road authority, company, body, or person shall be subject to the following restrictions; . . . .

"2. Before they commence any work whereby the traffic on the tramway will be interrupted they shall (except in cases of urgency, in which cases no notice shall be necessary) give to the promoters . . . . notice of their intention to commence such work, specifying the time at which they will begin to do so, such notice to be given eighteen hours at least before the commencement of the work; . . . .

"5. Any company, body, or person shall not execute such work so far as it immediately affects the tramway except under the superintendence of the promoters, unless they refuse or neglect to give such

superintendence at the time specified in the notice for the commencement of the work, or discontinue the same during the progress of the work; and they shall execute such work at their own expense and to the reasonable satisfaction of the promoters: provided that any additional expense imposed upon them by reason of the existence of the tramway in any road or place where any such mains, pipes, tubes, wires, or apparatus shall have been laid before the construction of such tramway shall be borne by the promoters."

A gas company executed work in roads along which a tramway ran, part of which work consisted in laying down new service pipes (so laid for the first time since the construction of the tramway) and connecting the same with their mains, which had been laid down before the construction of the tramway.

In one instance during the execution of the work, where there was a double tram line, the cars of one line were diverted to the other line, and the up and down cars were both carried over the same line for a whole day, such diversion being made at the request of the gas company for the purpose of enabling them to repair a fractured main which was causing a serious escape of gas. In other instances the tramcars were either slowed down or only brought to a standstill for a sufficient time to enable the workmen of the gas company to get out of the trenches under or near the tram lines where they were at work on the pipes of the gas company.

By reason of the existence of the tramway additional expense was imposed upon the gas company in connecting the new service pipes with their mains:—

Held (affirming in part the decision of Phillimore J., reported [1909] 2 K. B. 297), that the gas company were entitled to recover such additional expense from the tramway company under sub-s. 5 of the before-mentioned section, inasmuch as there had been an interruption of the traffic on the tramway within the meaning of sub-s. 2 of that section, and the connection of a new service pipe with the main as aforesaid involved an alteration of the main; but

Held (dissenting in that respect from the decision of Phillimore J.), that the proviso in sub-s. 5 of the above-mentioned section does not apply in the case of work which is not such as to interrupt the traffic on the tramway.

APPEAL from the judgment of Phillimore J. upon questions raised by an award in the form of a special case stated by a referee appointed at the instance of the Bristol Gas Company by the Board of Trade in pursuance of the powers vested in them by s. 33 of the Tramways Act, 1870. (1)

(1) Sect. 33 of the Tramways Act, 1870, provides that any difference "between the promoters . . . . and any . . . . gas company" is to be settled by a referee appointed by the Board of Trade on the application of either party.

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The gas company alleged that, by reason of the lines of the Bristol Tramway and Carriage Company, Limited, having been laid over the mains of the gas company, and by reason of the existence of the tramway, the gas company had incurred additional expense in obtaining access to its mains and in altering and connecting service pipes with the mains in excess of the expense which would have been incurred in making the alterations and connections if the tramway had not been laid over the mains.

The facts (so far as material) were as follows:

From February 16, 1905, to December 28, 1906, both inclusive, the work hereinafter mentioned was carried out by the gas company upon portions of its undertaking. All the gas mains hereinafter referred to were laid prior to the construction of the tramway. Some of the service pipes were laid before and some after the construction of the tramway. By reason of the existence of the tramway company's tramway in the roads or places where the gas company's mains had been previously laid, additional expense had been imposed upon the gas company in doing the following classes of work:—

Class A. Laying down a new service pipe and connecting the same (for the first time since the construction of the tramway) with a main laid before the construction of the tramway.

Class B. Repairing, altering, or removing a service pipe laid since the tramway was constructed, the main having been laid before the construction of the tramway.

Class C. Repairing, altering, or removing a service pipe or a main laid before the tramway was constructed.

The additional expense for the above-mentioned classes of work respectively was as follows:

	£	s.	d.
Under Class A	63	19	8
,, ,, B	14	1	8
,, ,, C	37	16	8
	£115	18	0

On each occasion before commencing work the gas company gave the tramway company notice under s. 32, sub-s. 2, of the

Tramways Act, 1870, of its intention to commence work. The form of such notice was as follows: "Please note that this company intend on the day of at o'clock in the forenoon, or as soon afterwards as their workmen conveniently can, to take up the pavement or ground near to or opposite the following places for the purpose of laying or repairing service pipes, &c., &c., namely . . . ." Each of these notices was given at least eighteen hours before the commencement of the work referred to therein, but in a number of instances such work was not in fact commenced by the gas company until some time varying from several hours to several days after the expiration of the said eighteen hours.

The tramway company refused to pay to the gas company any part of the 115*l.* 18*s.*

In no case did the tramway company give any superintendence during the execution of the work.

In one instance, where there was a double tram line, the cars of one line were diverted to the other line, and the up and down cars were both carried over the same line for a whole day, such diversion being made at the request of the gas company for the purpose of enabling them to repair a fractured main which was causing a serious escape of gas.

In all the other instances the tramcars were either slowed down or only brought to a standstill for a sufficient time to enable the gas company's workmen to get out of the trenches under or near the tram lines where they were at work on the gas company's pipes.

Flags and danger boards were put up by the gas company to warn the tram-drivers of the fact that men were working in the trenches, and in some cases additional watchmen were employed by the gas company to warn their workmen of the approach of trams.

Connecting a new service pipe with a main in each case involved the drilling of a hole in the main.

The referee was requested by both parties to make his award in the form of a special case and to embody therein, in the form of answers to specific questions, his findings upon certain points of law and construction material for the purposes of his award;

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and, pursuant to the said request, the following specific questions were drawn up by the referee, and agreed to by both parties, as correctly raising such questions of law and construction, and the referee answered the same as hereafter mentioned.

Q. (1.) Does the proviso in sub-s. 5 of s. 32 of the Tramways Act, 1870, apply if the work claimed for does not cause an interruption of tramway traffic within the meaning of sub-s. 2? A.—Yes.

Q. (2.) Do the facts proved in this case, which are admitted, constitute in law "interruption" within the meaning of sub-s. 2? A.—Yes.

Q. (3.) Did the notices of the intention to commence work served by the gas company upon the tramway company comply with the section? A.—Yes.

Q. (4.) If the notices did not comply with the section, does such non-compliance affect the rights of the gas company in these proceedings? A.—No.

Q. (5.) It being admitted that in each case the gas mains were laid before the construction of the tramways, is the additional expense claimed by the gas company "additional expense" within the meaning of s. 32, sub-s. 5, of the Tramways Act, 1870, when such additional expense has been incurred in doing the following classes of work or either of them respectively:—

Class A. Laying down a new service pipe and connecting the same for the first time since the construction of the tramway with a main laid before the construction of the tramway? A.—No as to laying down new service pipes. Yes as to connecting them with the old mains, on the ground that making the connections alters the mains within the meaning of the section.

Class B. Repairing, altering, or removing a service pipe laid since the tramway was constructed, the main having been laid before the construction of the tramways? A.—No.

Class C. Repairing, altering, or removing a service pipe or a main laid before the tramway was constructed? A.—Yes.

The referee answered each of the above questions in the manner stated above subject to the opinion of the Court as to whether each of his said answers was in law right or wrong,

and proceeded to award consequentially upon the said answers that a certain amount was due from the tramway company to the gas company.

Phillimore J. held, on the argument of the special case, that all the findings of the referee were correct: see [1909] 2 K. B. 303.

The tramway company appealed against so much of the judgment of the learned judge as was unfavourable to them, but the gas company did not appeal against the judgment of the learned judge upon the questions which he decided against them: see the judgment in the Court below; and therefore those questions did not arise on the appeal. (1)

(1) Tramways Act, 1870, s. 32: "Nothing in this Act shall take away or abridge any power to open or break up any road along or across which any tramway is laid, or any other power vested in any local authority or road authority for any of the purposes for which such authority is respectively constituted, or in any company, body, or person for the purpose of laying down, repairing, altering, or removing any pipe for the supply of gas or water, or any tubes, wires, or apparatus for telegraphic or other purposes, but in the exercise of such power every such local authority, road authority, company, body, or person shall be subject to the following restrictions; (that is to say,)

"1. They shall cause as little detriment or inconvenience to the promoters and lessees as circumstances admit:

"2. Before they commence any work whereby the traffic on the tramway will be interrupted they shall (except in cases of urgency, in which cases no notice shall be necessary) give to the promoters and lessees, if there be any, notice of their intention to commence such work, specifying the time at which they will begin to do so, such notice to be given eighteen hours at least before the commencement of the work:

"3. They shall not be liable to pay to the promoters or lessees any compensation for injury done to the tramway by the execution of such work, or for loss of traffic occasioned thereby, or for the reasonable exercise of the powers so vested in them as aforesaid:

"4. Whenever for the purpose of enabling them to execute such work the local authority or the road authority shall so require, the promoters or lessees shall either stop traffic on the tramway to which the notice shall refer, where it would otherwise interfere with such work, or shore up and secure the same at their own risk and cost during the execution of the work there: provided that such work shall always be completed by the local authority or the road authority, as the case may be, with all reasonable expedition:

"5. Any company, body, or person shall not execute such work so far as it immediately affects the tramway except under the superintendence of

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Balfour Browne, K.C., and *Simon, K.C.* (*R. B. Murphy* with them), for the appellants, the tramway company. The words "such work" in sub-s. 5 of s. 32 of the Tramways Act, 1870, mean such work as is mentioned in sub-s. 2, namely, "work whereby the traffic on the tramway will be interrupted," and as to which notice has to be given to the tramway company as provided by that sub-section. It is such work that is contemplated in all the sub-sections from sub-s. 2 to sub-s. 5 inclusive. That is the only work with regard to which any notice is required to be given to the tramway company. Sub-s. 4 speaks of "the tramway to which 'the' notice shall refer"; and sub-s. 5 speaks of the "time specified in 'the' notice for the commencement of the work," thereby clearly referring back to sub-s. 2, which provides that, in the case of "work whereby the traffic on the tramway will be interrupted," notice of the intention to commence such work must be given, specifying the time at which it will be commenced. The last sentence of sub-s. 5 is in form and substance clearly a proviso to that sub-section, and cannot be construed as a substantive enactment to the effect that, in the case of any operation effected in the exercise of a power preserved by the opening part of the section, additional expense caused by the existence of the tramway shall be borne by the tramway company. Unless the work to which the proviso applies is confined to work of which the tramway company is to receive notice, they may be charged with additional expense in respect of work of which they knew nothing, and the outlay on which they had no opportunity of checking. As a matter of grammatical construction, the words "such work" in sub-s. 5 must bear the meaning contended for by the appellants, and the legislation so construed is perfectly reasonable. The provisions as to "such work" contained in the

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the promoters, unless they refuse or neglect to give such superintendence at the time specified in the notice for the commencement of the work, or discontinue the same during the progress of the work; and they shall execute such work at their own expense, and to the reasonable satisfaction of the promoters: provided that any additional expense imposed upon them by reason of the existence of the tramway in any road or place where any such mains, pipes, tubes, wires, or apparatus shall have been laid before the construction of such tramway shall be borne by the promoters."

sub-sections from sub-s. 2 to sub-s. 5, inclusive, are only intended to apply to serious operations such as will interrupt the traffic of the tramway, and it was not thought necessary that notice should be given to the tramway company of a minor operation such as would not interfere with their traffic, or that any additional expense of such an operation caused by the existence of the tramway, which would in the nature of things be trifling, should be borne by the tramway company. The Legislature were dealing with the case of a road in which there was no existing tramway, and with regard to which authorities and bodies other than tramway companies had already powers to take up the roadway for certain purposes, such as highway purposes, and the supply of gas or water; and they had, in so doing, to adjust the rights inter se of such authorities or bodies and a tramway company which might in the future construct a tramway in the road. Accordingly the Legislature provide, by way of adjustment between the conflicting interests of the parties, that the powers vested in such authorities or bodies with regard to the roadway shall not be taken away or abridged, but in the exercise of those powers they shall be subject to certain restrictions; that is to say, they shall cause as little damage or inconvenience to the tramway company as the circumstances will admit, and, with regard to serious operations intended to be carried out by them which will interrupt the traffic of the tramway, they must give notice of "such work" to the tramway company; they are not to be liable to pay compensation to the tramway company for injury occasioned to that company by the reasonable exercise of their powers; but, with regard to any part of "such work," i.e., the work which will interrupt the traffic, immediately affecting the tramway, the provisions of sub-s. 5 as to the superintendence of the work by the tramway company, and the bearing by that company of any additional expense caused by the existence of the tramway, are to apply. A work as a whole may interrupt the traffic on the tramway, as, for instance, where a trench has to be made right across the road; but only part of that work may immediately affect the tramway itself, and therefore require supervision by the tramway company. Sub-s. 5 deals with that limited portion of "such work." With regard to those minor

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operations, carried out in the exercise of the powers preserved by the section, which will not interrupt the traffic on the tramway, those exercising the powers are left to bear any additional expense imposed on them by the existence of the tramway. There is nothing unreasonable in such legislation.

Secondly, there was not in the present case anything amounting to "interruption" of the tramway traffic within the meaning of sub-s. 2 of s. 32. By "interruption" is meant a complete break in the service of the tramcars. All that happened here was that there was in one instance a diversion of the traffic for a short time from one set of rails to the other between certain points, and in other instances a slight delay through the cars being stopped for a few moments, or slowed down, to enable workmen employed by the gas company to get out of the trenches in which they were working till the car had passed. There was nothing amounting to a substantial break in the traffic.

The notices given by the gas company were not sufficiently specific as to the time of the commencement of the work.

Lastly, the referee and the learned judge were wrong in holding that making a hole in the main for the purpose of effecting a connection between it and a newly laid service pipe constituted an alteration of the main within the meaning of s. 32. It is really part of the process of laying the new service pipe, for a service pipe is not effectually laid until it is connected with the main.

Sir A. Cripps, K.C., and *F. E. Weatherly*, for the respondents, the Bristol Gas Company. If there was an interruption of the tramway traffic within the meaning of sub-s. 2 of s. 32, which, it is submitted, clearly was the case, then, subject to the question as to whether drilling a hole in the main, for the purpose of connecting a new service pipe with it, can be said to be an alteration of the main, it is not disputed that the respondents in this appeal would be entitled to succeed. In that case, the first question, namely, whether, upon the true construction of s. 32, the proviso to sub-s. 5 applies to work which does not interrupt the traffic on the tramway, becomes merely academic, so far as the claim in the present case is concerned; and it is really very difficult to see how a decision on that question could affect the

future relations between these parties; for it is very unlikely that any claim could really arise for such trifling additional expense as might be caused through the existence of the tramway in the case of such minor operations as would not interrupt the traffic of the tramway. So far as the question of "interruption" is one of fact, the referee has found that there was an interruption of the traffic, and on the facts he was clearly justified in point of law in so finding.

The operation of making a hole in the main for the purpose of connecting a new service pipe with it, and making such connection, involves an alteration of the main. If not, then a gas company would have no power to make such a connection, because the only power of interfering with the roadway for that purpose which they have is derived from the Gas Works Clauses Act, 1847 (10 & 11 Vict. c. 15), s. 6, which gives them that power for the purpose of altering or removing mains.

With regard to the first question, namely, as to the construction of sub-s. 5 of s. 32, it may be observed that the word "such" is not used in a technically correct sense in that sub-section, for it speaks of "such mains," there having been no reference to "mains" in the previous part of the section. It is contended that the proviso may well be read as a proviso upon the section taken as a whole, and not merely a proviso upon sub-s. 5.

Balfour Browne, K.C., for the appellants, in reply.

BUCKLEY L.J. I think that this appeal fails, principally upon the ground that the answers given by the referee to questions 2 and 3 are correct. Those questions arise upon the construction of s. 32 of the Tramways Act, 1870, the main question being whether certain expenses in respect of which the respondents claim were incurred in the execution of work "whereby the traffic on the tramway" would "be interrupted." Question 2 is, "Do the facts proved in this case, which are admitted, constitute in law 'interruption' within the meaning of sub-s. 2?" The facts referred to are stated in the case thus: "In one instance, where there was a double tram line, the cars of one line were diverted to the other line, and the up and down cars were both carried over the same line for a whole day, such diversion being made at

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the request of the gas company for the purpose of enabling them to repair a fractured main, which was causing a serious escape of gas. In all the other instances the tramcars were either slowed down or only brought to a standstill for a sufficient time to enable the gas company's workmen to get out of the trenches under or near the tram lines where they were at work on the gas company's pipes. Flags and danger boards were put up by the gas company to warn the tram-drivers of the fact that men were working in the trenches, and in some cases additional watchmen were employed by the gas company to warn their workmen of the approach of trams." On those facts, it appears to me that the traffic on the tramway was interrupted within the meaning of sub-s. 2 by reason of what occurred both in the first-mentioned instance and also in the other instances. In the first instance the tramway company were, before the work commenced, in possession of two pairs of rails available for the purposes of their traffic, and by the events which happened they were altogether deprived of the use of one pair of rails for a whole day, and were compelled to conduct both their up and down traffic by the other pair. I think that was an interruption of the traffic on the tramway within the meaning of the sub-section. There was, as it seems to me, an interruption of the traffic also in the other instances, where it became necessary, before the tramcars could safely pass, to bring the cars to a standstill for a time, or at any rate to slow them down, so that workmen in the employ of the gas company, who were at work in trenches under and near the tram lines, could get out of the trenches before the cars passed. I think that the answer given by the referee to question 2 was correct. Then question 3 is, "Did the notices of the intention to commence work served by the gas company upon the tramway company comply with the section?" The form of notice is set out in the special case. It is a notice that the gas "company intend" on a certain day and at a certain hour, "or as soon afterwards as their workmen conveniently can, to take up the pavement or ground near to or opposite the following places for the purpose of laying or repairing service pipes," &c. It is not denied that these notices were sufficiently specific with regard

to the places where the work was to be done. They seem to me to have been proper notices within the Act of Parliament; the company did not commence the work referred to in the notices respectively till more than eighteen hours after the notices were respectively given. I think that the answer given by the referee to question 3 was correct.

Questions 2 and 3 being answered in the affirmative, question 1 does not arise. That being so, we have felt some difficulty as to whether we ought to give any answer to it. We have, however, come to the conclusion that it is proper to go on to deal with this question, because the order of the Court below declares that all the findings of the referee are correct, and he has answered this question.

This question is the one which presents the greatest difficulty. It may be stated thus: to what works do the words "such work" found in s. 32 from sub-s. 2 onwards apply? The opening words of s. 32, before the sub-sections are reached, refer to two classes of bodies or persons, namely, (1.) local authorities or road authorities, and (2.) companies, bodies, or persons possessing powers of opening or breaking up roads for the purpose of laying down, repairing, altering, or removing pipes for the supply of gas or water, or tubes, wires, or apparatus for telegraphic or other purposes. They provide that the Act shall not take away or abridge any power to open or break up any road along or across which any tramway is laid, or any other power vested in such authorities, companies, bodies, or persons. These earlier words of the section refer generally to any operations in the road which may be undertaken, in the exercise of the powers preserved by the section, by either of the two classes of bodies therein mentioned. The section goes on to provide that they shall, in the exercise of such power, nevertheless "be subject to the following restrictions." The section is not skilfully framed, because, when we come to sub-s. 3, we find that that is not a restriction at all, but a provision in favour of those exercising the power to break up the road, for it exonerates them from liability to pay compensation to the tramway company for injury thereby occasioned to them.

Sub-ss. 1 and 2 are clauses restrictive of the operating body,

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and in favour of the tramway company. Sub-s. 1 provides that those exercising the power shall "cause as little detriment or inconvenience to the promoters and lessees as circumstances admit." Sub-s. 2, in which the words "such work" are first used, provides that "before they commence any work whereby the traffic on the tramway will be interrupted they shall (except in cases of urgency, in which cases no notice shall be necessary) give to the promoters and lessees, if there be any, notice of their intention to commence 'such work,' specifying the time at which they will begin to do so, such notice to be given eighteen hours at least before the commencement of the work." The question is whether the words "such work" mean any operation the power to perform which is preserved by the earlier part of the section, or only work whereby the traffic on the tramway will be interrupted. A good reason for thinking the latter view to be correct is to be found in the fact that the notice of the intention to commence "such work" is to be given to the tramway company the traffic on whose line will be interrupted by the work in question. I find the words "such work" again in sub-s. 3, which provides that those exercising the power to break up the road "shall not be liable to pay to the promoters or lessees any compensation for injury done to the tramway by the execution of 'such work,' or for loss of traffic occasioned thereby." I pause here to observe that, if the sub-section had ended at that point, there might be reason for saying that the words "such work" must include any of the work contemplated in the earlier part of the section; but we are not driven to say that, because the sub-section proceeds thus, "or for the reasonable exercise of the powers so vested in them as aforesaid." Therefore, even if the words "such work" in the sub-section are confined to work whereby the traffic on the tramway will be interrupted, there are still words in it which relieve those exercising any of the powers preserved by the section from liability to compensate the tramway company if the work is done in the reasonable exercise of that power. Then I come to sub-s. 4. That sub-section has to do with bodies of the first class mentioned in the opening words of s. 32, namely, local authorities and road authorities. It provides that,

"whenever, for the purpose of enabling them to execute 'such work,' the local authority or the road authority shall so require, the promoters or lessees shall either stop traffic on the tramway to which the notice shall refer, where it would otherwise interfere with such work, or shore up and secure the same at their own risk and cost during the execution of the work there." Here again we find "such work" referred to as work with regard to which a notice has to be given; and, inasmuch as a notice has only to be given in the case of a limited class of work, namely, work which will interrupt the traffic on the tramway, a strong reason is afforded for saying that the expression "such work" in that sub-section must be confined to work of that nature. Then coming to sub-s. 5, the sub-section upon which the first question in the case turns, a difficulty arises. This sub-section has to do with bodies of the second class, and it provides that, except under certain conditions, any company, body, or person shall not execute "such work so far as it immediately affects the tramway." Pausing there, it may be argued that this expression describes a different class of work from that described in sub-s. 2. But, if by reference to the context the words "such work" in sub-s. 5 ought to be limited to the work referred to in sub-s. 2, namely, work whereby the traffic on the tramway will be interrupted, then this expression is reconciled by saying that it refers to so much of that limited class of work as is of a still more limited description, i.e., to such part of the work which will interrupt the traffic on the tramway as is work which immediately affects the tramway. The sub-section provides that they shall not execute that work except under the superintendence of the tramway company, "unless they refuse or neglect to give such superintendence at the time specified in 'the' notice for the commencement of the work, or discontinue the same during the progress of the work," and that "they shall execute such work at their own expense, and to the reasonable satisfaction of the promoters"; and then comes the proviso, "provided that any additional expense imposed upon them by reason of the existence of the tramway in any road or place where any such mains, pipes, tubes, wires, or apparatus shall have been laid

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before the construction of such tramway shall be borne by the promoters." That is a proviso which, as it is printed in the Queen's printers' copy of the Act, stands as a proviso, not to the section generally, but to sub-s. 5. It appears to me to be a proviso relating to a particular kind of expense, namely, the expense of "such work" as is referred to in the sub-section; and therefore, if I am right in my construction of the words "such work" in the sub-section, it follows that the answer to the first question mentioned in the special case ought to be in the negative.

There remains another question, which in substance is this: where a gas company's main has been laid in a street before a tramway came into existence, and the gas company have obtained access to that main for the purpose of making an aperture in it and connecting with it a new service pipe laid down by them, have they by so doing made an "alteration" of their main? I think that they have. They have caused the structure of the main, which enabled a supply of gas to be carried in a certain line of flow, to be so dealt with that the flow of the gas is affected at the particular point, so that some of the gas is there diverted, and no longer flows onwards, but finds its way into the new service pipe; so that the main will be used for a new purpose, namely, to carry gas down the line of that pipe. It seems to me that this constitutes an alteration of the main. The result of the appeal, in my opinion, must be that this Court affirms the answers given by the referee to questions 2, 3, and 5, but declares that the answer given by him to question 1, if it arose upon the facts, was not correct; that the proviso to sub-s. 5 of s. 32 of the Tramways Act, 1870, does not apply if the work claimed for is not work whereby the traffic on the tramway will be interrupted within the meaning of sub-s. 2. I think the respondents must have the costs of the appeal.

KENNEDY L.J. I am of the same opinion. It appears to me, having regard to the terms of the order made by the learned judge in the Court below, that we ought to deal with the finding of the referee upon question 1, although it would be sufficient for the purpose of deciding this appeal, so far as the amount now

claimed by the respondents is concerned, to say that the referee's answers to questions 2 and 3 were correct. With regard to the meaning of the words "such work" in sub-s. 5, I feel myself, on the whole, obliged to assent to the argument addressed to us by the appellants' counsel, and, so far, to differ with respect from the view expressed by the learned judge below. At the same time I think that, as regards question 1, the case is not a very easy one to decide; and I find it impossible, looking at the terms of s. 32, to say that its true construction, so far as it affects this question, is a matter entirely free from doubt. I may just mention one difficulty that has occurred to me. Sub-s. 2 of the section provides that in a case of urgency no notice of the work need be given to the tramway company. That being so, it becomes a little difficult to see why that contingency is not kept in view in sub-ss. 4 and 5, each of which appears to assume that a notice must necessarily have been given. Those sub-sections both speak of "the notice" as if in all cases such a notice must be given, whereas in sub-s. 2 it is expressly provided that in cases of urgency no notice need be given. Therefore, when I come to the words in sub-s. 5, upon which so much stress was laid by the appellants' counsel, namely, the words "at the time specified in 'the notice' for the commencement of the work," I feel a difficulty as to their application, seeing that it is perfectly possible that there may be work whereby the traffic on the tramway will be interrupted and therefore work to which, according to the appellants' argument, the sub-section would apply, and yet in regard to which no notice would have to be given. On the whole, however, as I have said, I find it impossible to give a satisfactory answer to the argument for the appellants, according to which, upon the true construction of s. 32, the words "such work," as used in sub-s. 5 of that section, refer to work of such a kind as that, except in cases of urgency, notice of the intention to commence it is rendered requisite by sub-s. 2; and therefore it is only to such work, whether under sub-s. 2 notice has to be given of its commencement, or need not be given because of urgency, so far as that work immediately affects the tramway, that the provisions of sub-s. 5 apply. That being so, with the greatest respect to the learned

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judge below, I find myself unable to affirm the view expressed by him upon question 1. It is, however, as has been already pointed out, unnecessary to determine this question for the purpose of deciding whether in the result the respondents are entitled to payment of the amount which the referee has found to be due to them, because he has found, and I think rightly, that in fact the work in question came within the meaning of the terms "work whereby the traffic on the tramway will be interrupted," as used in sub-s. 2; and also that due notice of the intention to commence the work was given in compliance with the sub-section. I think that the facts stated in the case are quite sufficient as a matter of law to justify the referee in the conclusion at which he arrived as to the sufficiency of the notices given.

With regard to the question whether the work done in connecting the new service pipes with the mains constituted an alteration of the main, I see no reason for saying that the referee and the learned judge were wrong in their finding on that point.

SWINFEN EADY J. I am of the same opinion. I propose only to add a word or two on the construction of s. 32, as we are differing from the view taken by the learned judge below on that point. The earlier part of s. 32 provides that "nothing in this Act shall take away or abridge any power to open or break up any road along or across which any tramway is laid, or any other power vested in any local authority or road authority for any of the purposes for which such authority is respectively constituted, or in any company, body, or person for the purpose of laying down, repairing, altering, or removing any pipe for the supply of gas or water, or any tubes, wires, or apparatus for telegraphic or other purposes, but in the exercise of such power every such local authority, road authority, company, body, or person shall be subject to the following restrictions." The section then proceeds in the first three sub-sections to deal with both the before-mentioned classes, i.e., (1.) the local or road authorities, and (2.) the companies, bodies, or persons supplying gas or water, &c. By sub-s. 1 they are to cause as little detriment or inconvenience to the promoters as circumstances will admit.

By sub-s. 2, before commencing any "work whereby the traffic on the tramway will be interrupted," they must give notice to the promoters as therein mentioned. By sub-s. 3, "they shall not be liable to pay to the promoters or lessees any compensation for injury done to the tramway by the execution of the work or for loss of traffic occasioned thereby, or for the reasonable exercise of the powers vested in them as aforesaid." All these three sub-sections deal with both the classes of bodies or persons mentioned in the earlier part of the section. Then we come to sub-s. 4, which is limited to cases in which the work is done by local authorities or road authorities, and provides that, "whenever for the purpose of enabling them to execute such work the local authority or the road authority may so require, the promoters or lessees shall either stop traffic on the tramway 'to which the notice shall refer,' or shore up and secure the same at their own risk and cost during the execution of the work there." The next sub-section, sub-s. 5, does not apply to local authorities or road authorities, but only to "any company, body, or person," and it provides that they "shall not execute 'such work,' so far as it immediately affects the tramway, except under the superintendence of the promoters, unless they refuse or neglect to give such superintendence 'at the time specified in the notice for the commencement of the work,' or discontinue the same during the progress of the work." In my judgment the words "such work" in that provision refer to such work as is mentioned in sub-s. 2, namely, "work whereby the traffic on the tramway will be interrupted." The application of the provision to such work is, however, limited by the words "so far as it immediately affects the tramway." The work contemplated appears to me to be so much of any work coming within the provisions of sub-s. 2 as immediately affects the tramway. The sub-section provides for the superintendence of that work by the tramway company "at the time specified in the notice," which notice is that required to be given under sub-s. 2; and this is only required in the case of work whereby the traffic on the tramway will be interrupted. Then follow the words of the proviso with regard to "additional expense imposed upon them by reason of the existence of the tramway." These must be read as applying only

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to additional expense in the execution of "such work," and not as extending to cases where the work does not cause any interruption of the tramway traffic. The "additional expense" is a portion of the expense mentioned in the previous line of the sub-section.

Judgment accordingly.

Solicitors for appellants: *Stanley, Wasbrough, Doggett & Baker, for Stanley, Wasbrough & Doggett, Bristol.*

Solicitors for respondents: *Meredith, Mills & Clark, for T. D. Sibly, Bristol.*

E. L.

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MENTZ, DECKER & CO. *v.* MARITIME INSURANCE COMPANY.

Insurance, Marine—Deviation Clause—Agreement that Vessel shall be covered at a Premium to be arranged—Subject to "due Notice" of Deviation—Notice given after Loss.

Where a policy of marine insurance contains a clause to the effect that in the event of the vessel making any deviation it shall be held covered at a premium to be arranged, "provided due notice be given by the assured on receipt of advice of such deviation":—

Semble that, if the assured is not advised of the deviation until after loss of the vessel, a notice given by him after loss will be sufficient to satisfy the proviso.

TRIAL of action before Hamilton J.

The action was upon seven policies of marine insurance subscribed by the defendants. The policies were on commissions on the ship *Viduco*, of which the plaintiffs were the owners, and were for a voyage to a port of loading in Costa Rica and thence to a port of discharge in the United Kingdom. Amongst the perils insured against was barratry of the master. The policies contained the following clause: "In the event of the vessel making any deviation or change of voyage it is mutually agreed that such deviation or change shall be held covered at a premium to be arranged, provided due notice be given by the assured on receipt of advice of such deviation or

change of voyage." The ship in July, 1907, received orders to load at Cocos Bay, in Costa Rica. The captain, instead of proceeding directly to Cocos Bay, in breach of his orders and for his own private benefit took the ship to Cocos Island, which was several hundred miles out of his course. After leaving Cocos Island he went to Cocos Bay and there loaded his homeward cargo, but instead of proceeding on his homeward voyage he again wrongfully and for his own private purposes took the ship to Cocos Island. Whilst she was there she stranded, and in February, 1908, became a total loss. The plaintiffs had no knowledge of either of the two deviations to Cocos Island until April, 1908, when they were informed of the second deviation and at once gave notice of it to the defendants. They were not informed of the first deviation until the following month, and, not thinking a notice of it to be of any importance under the circumstances, they did not give any notice of it to the defendants till many months later.

The plaintiffs contended that the deviations were excused by s. 49, sub-s. 1 (*g*), of the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), as having been "caused by the barratrous conduct of the master." The defendants denied the barratry and contended that if the deviation was not excusable as being barratrous, neither was it excused by the deviation clause in the policy, as no due notice of the deviation had been given to the defendants by the plaintiffs.

Horridge, K.C., and *Bigham*, for the plaintiffs. If the plaintiffs are wrong in their contention that the conduct of the master amounted to barratry, still, on the true construction of the deviation clause, the assured are entitled to require the underwriters to hold them covered notwithstanding that the assured did not discover the fact of deviation until after the loss. The "premium to be arranged" must in that event be such a premium as it would have been reasonable for the underwriters to charge if they had known of the deviation at the time it occurred and before the loss had happened: *Greenock Steamship Co.* v. *Maritime Insurance Co.* (1) It is conceded that the plaintiffs must pay

(1) [1903] 1 K. B. 367.

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such a premium in respect of both deviations, but subject to that deduction they are entitled to the amount insured.

Leslie Scott, K.C., and *Simey*, for the defendants. Assuming that the deviations were not barratrous, the plaintiffs cannot recover, for they did not satisfy the proviso in the deviation clause that "due notice" of the deviation should be given. That proviso was inserted after the decision in the *Greenock Steamship Co.'s Case* (1) and was designed to meet that decision. The object of requiring the notice was to enable the underwriters to reinsure the risk. Therefore the clause has no application where the notice is not given till after loss, for in that case the notice is useless. It was intended to be given during the continuance of the risk. For on any other construction the agreement would be wholly one-sided. If the vessel arrived safely the underwriters would not get their extra premium, for the assured would not give notice of the deviation, whereas if there was a loss they would have to pay on the policy. It cannot have been intended to leave it at the option of the assured whether they would pay the extra premium or not. The inference is that if the clause was not intended to apply where notice was not given before determination of the risk by safe arrival, neither was it intended to apply where notice was not given till after determination of the risk by loss.

Horridge, K.C., in reply. The clause means that the assured are to pass on to the underwriters for their benefit such notice of the deviation as they themselves receive. If the assured get such notice before loss they must send it on at once. If they do not get it till after loss there is no necessity to send it on immediately, as there is nothing to be gained by their so doing. (2)

HAMILTON J. As there has been an argument upon the deviation clause, I think I ought to state my opinion as to its meaning. With regard to the basis upon which the premium

(1) [1903] 1 K. B. 367.

(2) The judge found as a fact that the conduct of the master on the occasion of both deviations was barratrous, but as he also expressed his opinion upon the construction of the deviation clause, it has been thought advisable to report it.

is to be arranged where the arrangement does not take place until after the vessel is lost, I think I am bound by the judgment of Bigham J. in *Greenock Steamship Co.* v. *Maritime Insurance Co.* (1), and must hold that the premium is to be calculated as it would have been calculated by the parties, if they had known of the deviation at the time that it happened. But then it is said that the proviso as to due notice, which has been added to the clause since the decision in that case, makes a difference, and that, as a notice given after loss cannot be effective for the purpose for which it was required, namely, reinsurance, such a notice cannot be said to be "due notice," and the assured cannot claim the benefit of the clause. I am unable to accept that contention. I agree that it is impossible to construe the clause as giving an option to the assured to be covered or not as he chooses, but I think that in the event of the ship arriving safely the assured would be bound to give the notice and the underwriter would be entitled to his premium. On the other hand I do not think that the words "due notice" can be read as meaning that no notice is to be considered as "due" unless it is given at a time when the underwriter can still protect himself by reinsurance. I think the clause must be read as an agreement to hold the assured covered subject to a proviso which is satisfied by the giving of such a notice as the assured could give after advice of the deviation, and that, there being nothing practicable to be done on the receipt of the notice under the circumstances of the present case, the notice was given sufficiently early at the time when it was in fact given.

Solicitors for plaintiffs: *Lightbound, Owen & McIver.*

Solicitors for defendants: *Field, Roscoe & Co., for Batesons, Warr & Wilmhurst, Liverpool.*

(1) [1903] 1 K. B. 367.

J. F. C.

1909
Nov. 29

In re EILBECK.

Ex parte THE TRUSTEES OF THE "GOOD INTENT" LODGE, NO. 987 OF THE GRAND UNITED ORDER OF ODD FELLOWS.

Bankruptcy—Friendly Society—Defaulting Treasurer—Removal from Office—Bankruptcy of Treasurer—Preferential Debt—Friendly Societies Act, 1896 (59 & 60 *Vict. c.* 25), *ss.* 34, 35, 106.

At the date when the treasurer of a friendly society ceased to be an officer of the society he was liable to account for moneys of the society which he had received and had improperly retained. Shortly afterwards he was adjudicated a bankrupt.

Held, that the society was entitled, by virtue of s. 35 of the Friendly Societies Act, 1896, to be paid out of his assets the sum due from him in priority to all his other creditors.

In re Miller, [1893] 1 Q. B. 327, followed.

THIS was a special case stated under s. 97, sub-s. 3, of the Bankruptcy Act, 1883, by the judge of the Whitehaven County Court for the opinion of the High Court under these circumstances.

The debtor for many years previously to December 28, 1908, was the treasurer of the "Good Intent" Lodge of the Grand United Order of Odd Fellows, having been originally elected at one of the annual general meetings, and was thereafter from time to time at the like annual general meetings re-elected to that position. The last occasion on which he was so re-elected was on December 28, 1907. The debtor ceased to hold the said office of treasurer on December 26, 1908, on which date another person was elected treasurer in his place.

During the whole of the debtor's period of office as such treasurer the whole of the moneys received in connection with the sick and funeral fund, the management fund, and the medical aid fund respectively of the lodge passed through his hands in his capacity of treasurer, and when the balance sheet of the lodge for the year ending December 31, 1908, was prepared it shewed that the debtor had received on behalf of the lodge and ought to have had in hand when he ceased to be an officer a sum of 200*l.* 0*s.* 5*d.*, which sum was made up of

46*l.* 15*s.* 6*d.* in respect of contributions received by him in connection with the medical aid fund and 153*l.* 4*s.* 11*d.* in respect of cash received by him in connection with the sick and funeral fund and the management fund.

On February 16, 1909, a receiving order was made against him on his own petition, and the same day he was adjudicated bankrupt, and on February 20 an order was made under s. 121 of the Bankruptcy Act, 1883, for the summary administration of his estate, and the official receiver became the trustee of the estate.

The trustees of the lodge lodged a proof against the debtor's estate for the 200*l.* 0*s.* 5*d.*, and subsequently by their solicitor they made a claim for preferential payment of that amount out of the estate under s. 35 of the Friendly Societies Act, 1896, which the official receiver declined to comply with on the ground that that section was not applicable where the officer of the friendly society had ceased to be such before his bankruptcy. (1)

(1) The Friendly Societies Act, 1896, enacts, under the heading "Privileges of Registered Societies":

"34.—(1.) In any of the following cases, namely:—

"(i.) Where a person being or having been a trustee of a registered society or branch, and whether appointed before or after the registry thereof, in whose name any stock belonging to that society or branch transferable at the Bank of England or Bank of Ireland is standing, either jointly with another or others, or solely—

"(*a*) is absent from the British Islands; or

"(*b*) becomes bankrupt or files any petition or executes any deed for liquidation of his affairs by assignment or arrangement, or for composition with his creditors; or

"(*c*) becomes lunatic or is dead; or

"(*d*) has been removed from his office of trustee; or

"(ii.) if it is unknown whether such person is living or dead, the chief registrar may, on application in writing from the secretary and three members of the society or branch, and on proof satisfactory to him, direct the transfer of the stock into the names of any other persons as trustees for the society or branch.

. . . . .

"35.—(1.) In the following cases, namely—

"(*a*) upon the death or bankruptcy of any officer of a registered society or branch having in his possession by virtue of his office any money or property belonging to the society or branch; or

"(*b*) if any execution, attachment, or other process is issued, or action or diligence raised against any such officer or against his property,

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In November, 1909, the trustees of the lodge applied to the county court judge for an order directing the official receiver to hand over to them the property of the debtor or the gross proceeds of the realization thereof in so far as the same might be required to discharge the said sum of 200*l.* 0*s.* 5*d.*, and the county court judge at the request of the parties stated a case for the High Court, the question for the Court being whether the trustees were entitled to the order for which they asked.

It appeared from the debtor's statement of affairs that his debts were estimated at 467*l.* and his assets at 187*l.*

Hume-Williams, K.C., and *A. Brown*, for the society. The question is whether it is necessary for the purposes of s. 35 of the Act of 1896 to shew that an officer of the society is an officer at the date when the claim is made against him and has moneys of the society in his possession, or whether it is sufficient to shew that he has received moneys of the society whilst he was an officer and for which he has not accounted. Sect. 35 is an enabling section and gives the society the right to be paid moneys received by an officer out of his assets in priority to all his other creditors, and it is immaterial whether he was or was not an officer at the date when his defalcations were first discovered. The Act of 1875 is in substance re-enacted by the Act of 1896, which is a consolidation Act, and most of the decisions under the earlier Acts still apply. Sects. 34 and 35 of the Act of 1896 should be read together. Sect. 34 deals with the case of a person who is or has been a trustee of the society and has stocks or shares standing in his name which it is necessary to transfer on his death or bankruptcy,

his heirs, executors, or administrators, or trustee in bankruptcy, or the sheriff or other person executing the process, or the party using the action or diligence respectively shall, upon demand in writing of the trustees of the society or branch, or of any two of them, or of any person authorised by the society or branch, or by the committee thereof, to make the demand, pay the money, and deliver over the property to the trustees of the society or branch in preference to any other debt or claim against the estate of the officer.

. . . . .

"106. The expression 'officer' shall include any trustee, treasurer, secretary, or member of the committee of management of a society or branch, or person appointed by the society or branch to sue and be sued on its behalf."

and then s. 35 gives the right to follow moneys or property which have been received by an officer, and it is immaterial whether he was or was not an officer at the date of his bankruptcy. In the case of *In re Miller* (1) the treasurer had absconded and the society were held entitled to preferential payment, even although he had not the money in his possession and it could not be traced. *Day* v. *King* (2) may be cited for the debtor, but it is distinguishable. It was a criminal proceeding, and the plaintiff failed to prove that the defendant was an officer at the time and that the amount was due. It was quite a different case to the present. The intention of the Legislature is to preserve the privileges of friendly societies, and one of those privileges is to have a preferential claim to their moneys that have reached the hands of their officer whilst he was an officer, and his liability remains until he has accounted for it although his office is gone, and the mere lapse of a few days or of weeks cannot alter their rights or destroy their privileges: *Moors* v. *Marriott.* (3)

Hansell, for the official receiver. All the cases on preferential claims by friendly societies on the bankruptcy of their officers are summarized in The Laws of England, vol. ii. pp. 215—216. This preference is a privilege given by statute and must be construed with some strictness because it confers an overriding preference. If the society are right, they will sweep away the whole of the 187*l.*, and nothing will be left for the other creditors. Sect. 106 of the Act of 1896, which defines an "officer" to include "a treasurer of a society or branch," must be considered in construing s. 35 of the Act, which deals with "any officer of a society or branch" and points the distinction between that section and s. 34. In s. 35 the material time to be considered is the death or bankruptcy of "any officer"; that does not mean "any ex-officer"; and when one looks at s. 34, it applies expressly to the case of a person "who is or has been" an officer.

[PHILLIMORE J. referred to *In re Welch.* (4)]

That was a decision under s. 15, sub-s. 7, of the Act of 1875, and Wright J. in his judgment observes that there must be some

(1) [1893] 1 Q. B. 327, 337.
(2) (1836) 5 Ad. & E. 359.
(3) (1878) 7 Ch. D. 543.
(4) (1894) 1 Man. 62.

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limit to the rights of the society; and in the case of *In re Miller* (1) it seems that the absconding treasurer had not ceased to be an officer. If the Legislature intended s. 35 to apply to the case of an ex-officer, it should run "upon the death or bankruptcy of any person who is or has been an officer," and so on. To hold that it does so apply is, it is submitted, unduly extending its meaning. The official receiver relies strongly on the distinction between ss. 34 and 35. *Moors* v. *Marriott* (2) is a decision on s. 12 of 4 & 5 Will. 4, c. 40, which is similar to s. 34 of the present Act, and deals with a person who is or has been an officer. It is submitted that s. 35 only applies to the case of a person who is an officer at the date of his death or bankruptcy, and that its meaning should not be extended.

Hume-Williams, K.C., in reply. Sect. 23 of the Act of 1855 exactly covers this case.

PHILLIMORE J. I think upon the whole I must follow the line of the reasoning of Lindley L.J. in the case of *In re Miller* (3), and that, with regard to this case as with regard to that, "the truth is, that the whole difficulty has arisen from an incautious abridgment of the words of previous Acts. The draftsman of the Act of 1875 thought that he could shorten s. 23 of the Act of 1855, and in shortening it he has made it obscure." I think that that learned judge meant to say (and all the decisions mean the same) that the privileges which have been granted to friendly societies from as far back as the eighteenth century have never been intended to be diminished, and, therefore, if one finds doubtful words in later Acts, one should not construe them as taking away any privilege which had been given by the earlier Acts; and I must say that I think s. 23 of the Friendly Societies Act, 1855, is verbatim sufficient to cover this case. It is not necessary to put any forced construction upon any words used in that section in order to say that this money can be recovered by the trustees of this friendly society from the official receiver. No doubt, when one comes to the language of

(1) [1893] 1 Q. B. 327; 10 Mor. 21. (2) 7 Ch. D. 543.
(3) [1893] 1 Q. B. 327, 339.

s. 35 of the present Act, it does offer grounds for argument, because one must say, to give the effect to what the applicants ask for here, that an "officer" here at least means a man who has been an officer, against whom a claim is made for something which he received in virtue of his office, and who has not been discharged in respect of that claim although he has been discharged or has discharged himself in respect of his official powers and privileges and rights. There might be some difficulty in putting that construction upon s. 35 if it stood by itself and was not the result of a long history of legislation. But taking it as the result of a long history of legislation, I see no real difficulty in putting that construction upon it. I just observe in passing with regard to the Friendly Societies Act, 4 & 5 Will. 4, c. 40, s. 12, which was before Sir George Jessel M.R. in the case of *Moors* v. *Marriott* (1), that the language of the section was, if possible, slightly more favourable to the applicants there than in this case. Probably the process of reasoning of the Legislature is this. As Lindley L.J. said, once you can ascertain that a man has certain property as trustee for somebody else, it does not pass to his creditors under his bankruptcy. Difficulty of course arises with regard to money in respect of which the bankrupt is an accounting party. It may be that the circumstances are such that his misappropriation of it is criminal. There is no earmarking of money; and the language of the earlier Acts was much more logical. If it is something you can lay hands on, let that something—it might at any rate approach so nearly to money as to be a Bank of England note which could be identified—be handed over to the trustees of the friendly society; but if it is pure money, then hand over its equivalent. That was the more logical way of stating it under the earlier Acts. But the Court in *In re Miller* (2) came to the conclusion that that was what was intended to be effected by s. 15 of the Act of 1875, which is in substance reproduced by s. 35 of the Act of 1896, which I am dealing with. You are to treat money of this kind for this purpose as if you could earmark it. The bankrupt has received so many sovereigns which belong to the society; so

(1) 7 Ch. D. 543. (2) [1893] 1 Q. B. 327.

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many sovereigns he shall hand over. If he has to do that whilst still an officer, the analogy of trusts would make him do it when he ceased to be an officer. It is the commonest possible case that there are two operations to go through when a trustee is removed or removes himself. He has first to be party to a deed by which he is removed or removes himself, and there may be in the same or some other deed an appointment of a new trustee with a vesting declaration. That will vest everything which such a vesting order can vest, but it will not pass stocks or shares of any kind, nor will it pass Consols; and A. B., who has retired and has ceased in one sense to be a trustee, is nevertheless a trustee of those stocks and shares, because everybody who has got property which he holds in trust for somebody else is a trustee, whether he was so created by any instrument or so denominated by any person having the power to denominate him. Therefore in the same way a man who has got money of this kind which he is bound to account for is to be deemed still to be liable to account for it though the office by virtue of which he received it has passed from him. Another way of looking at it is to say that so long as he is accountable he cannot say that he is not an officer, and that, until he has received his discharge, he remains in the eye of the law liable as if he was an officer. There is a great deal of force in the argument upon s. 34. The words "being or having been a trustee" there used are really quite necessary, because a man might be a trustee of a society in the sense of being an officer of the society, and also a trustee for the society in the sense of having property of the society in his name which belonged to the society; and he may cease to be a trustee of without ceasing to be a trustee for the society. For that purpose the machinery of s. 34 is required. When it is remembered that s. 34 does not deal with all stocks and shares and securities, but only with stocks transferable at the Bank of England or Bank of Ireland, and, further, that the Bank of England, and I have no doubt the Bank of Ireland also, is accustomed to require the very strictest authority and direction before it transfers anything, the extreme importance of sweeping up everything in s. 34 becomes manifest. On the whole, therefore, I am of opinion that the applicants are right in this case,

and there must be judgment for them. There will be no order as to costs.

Solicitors: *Blyth, Dutton, Hartley & Co.; Solicitor to the Board of Trade.*

H. L. F.

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JACKSON *v.* PRICE AND ANOTHER.

1909

Nov. 27.

Money-lender—Carrying on Business at Registered Address—Cheque for Amount of Loan sent by Post to Borrower—Isolated Part of Transaction—Illegality—Money-lenders Act, 1900 (63 & 64 *Vict. c.* 51), *s.* 2, *sub-s.* 1 (*b*).

The terms of a loan were arranged between a registered money-lender and the borrower at the money-lender's registered address, and the promissory notes which were given as security for the loan were signed there. For the mutual convenience of both parties a cheque for the amount of the loan was sent by the money-lender by post to the borrower's address:—

Held, that the mere fact that the cheque for the money advanced was sent to the borrower by post, instead of being handed to the borrower at the money-lender's registered address, did not make the transaction void as being a carrying on of the moneylending business elsewhere than at the registered address in contravention of s. 2, sub-s. 1 (*b*), of the Money-lenders Act, 1900.

TRIAL of action before Darling J. without a jury.

The action was brought against the defendants, who were husband and wife, as the makers of three joint and several promissory notes for 40*l.* each, dated June 17, 1909, and payable to the plaintiff or order one month, two months, and three months respectively after date, and it was provided in each of the notes that if default were made in payment interest should become payable at the rate of one penny per shilling per week until payment. The plaintiff claimed the sum of 120*l.* upon the above notes and interest on the said sum.

The plaintiff was a registered money-lender, having two registered addresses, one at 26, Corporation Street, and the other at 70, Plymouth Grove, both in Manchester. On June 17, 1909, the defendants attended at 26, Corporation

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Street and applied for a loan, and terms were there agreed upon for a loan of 60*l.* by the plaintiff to the defendants, and the defendants there and then signed the three promissory notes. The plaintiff had left his cheque-book at his other registered address, and it was arranged, as the learned judge found, for the mutual convenience of both parties, that the plaintiff should send the cheque to the defendants at their private address by post. The plaintiff accordingly on the following day sent by post to the defendants a cheque for 57*l.*, being the above-mentioned sum of 60*l.* less the sum of 3*l.* deducted for commission at the rate of 5 per cent. upon the loan. The plaintiff subsequently agreed to postpone the payment of all the notes until the last note became due, namely, on September 20. The defendants did not pay the amounts of the promissory notes or any part thereof, and the writ in this action was issued on September 27, 1909. Upon an application for leave to sign final judgment for the amount of the three promissory notes and interest, the defendants set up the defence that the interest was excessive and the transaction harsh and unconscionable, and that the transaction was not carried out at the plaintiff's registered address, as required by the Money-lenders Act, 1900. The defendants obtained leave to defend, and the action was ordered to be entered in the list for hearing under Order XIV., r. 8.

J. B. Matthews, for the plaintiff. It is admitted that the interest is excessive, and the plaintiff is willing to submit to any rate of interest which the Court thinks fair. The real point in the case is whether the transaction is void as being in contravention of s. 2, sub-s. 1 (*b*), of the Money-lenders Act, 1900, which requires the money-lender to carry on the moneylending business at his registered address and at no other address. The transaction here was carried out at the plaintiff's registered address, except that the money was not actually handed over there, but was subsequently sent by post to the defendants. In *Gadd* v. *Provincial Union Bank* (1), which is relied upon by the defendants, the whole transaction was carried out at the borrower's house, and the Court of Appeal held that that mode

(1) [1909] 2 K. B. 353.

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of carrying on the business, though it was an isolated transaction, was a violation of s. 2, sub-s. 1 (*b*), of the Act, and avoided the transaction. It would be wrong to extend that decision to a case where some one detail of the transaction was not carried out at the registered address. The question is whether the transaction is substantially carried out at the registered address. Here the whole transaction was substantially carried out at the plaintiff's registered address. In *Levene* v. *Gardner* (1) one of the two makers of a joint and several promissory note given by them as security for a loan signed the note elsewhere than at the money-lender's registered address, and Phillimore J. held that it did not avoid the transaction. The learned judge in his judgment put this very case, because he said, speaking ironically and putting an extreme and ridiculous case, that he did not doubt that it was possible to find otherwise and to say that to post a letter outside the registered office made the transaction voidable. The policy of the Act is to enable a money-lender to be found by a borrower at his registered address so that the borrower may know that he is dealing with a money-lender. Therefore the mere fact that the amount of the loan was sent by post to the borrowers did not avoid the transaction.

Harold Morris, for the defendants. The whole transaction must be carried out at the money-lender's registered address; otherwise the transaction is void under s. 2, sub-s. 1 (*b*), of the Money-lenders Act of 1900. The decision in *Gadd* v. *Provincial Union Bank* (2) applies to an isolated part of a transaction as well as to an isolated transaction. Otherwise no test can be applied. It would be impossible to say how much of the transaction might be carried out elsewhere than at the registered address. The handing over of the money borrowed is one of the most important parts of the transaction, and if the money can be sent by post, it can equally be handed by the money-lender to the borrower at the borrower's house. In *Levene* v. *Gardner* (1) Phillimore J. said that it was possible to say that to post a letter outside the registered office made the transaction voidable; and in *Gadd* v. *Provincial Union Bank* (3) Fletcher Moulton L.J. said that an

(1) (1909) 25 Times L. R. 711. (2) [1909] 2 K. B. 353.
(3) [1909] 2 K. B. 353, at p. 356.

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infringement of the strict rules of the Act was not permissible, and the observations of Farwell L.J. (1) apply equally to an isolated part of a transaction as to an isolated transaction. The whole transaction must be carried out at the money-lender's registered address, and as that was not done in this case the transaction is void.

J. B. Matthews was not called upon to reply.

DARLING J. This case raises a somewhat peculiar point. By s. 2, sub-s. 1 (*a*), of the Money-lenders Act, 1900, a money-lender must register himself as a money-lender with the address, or all the addresses, if more than one, at which he carries on his business of money-lender; and by sub-s. 1 (*b*) he "shall carry on the moneylending business in his registered name, and in no other name and under no other description, and at his registered address or addresses, and at no other address." By sub-s. 2, "if a money-lender fails to register himself as required by this Act, or carries on business otherwise than in his registered name, or in more than one name, or elsewhere than at his registered address, or fails to comply with any other requirement of this section, he shall be liable on conviction under the Summary Jurisdiction Acts to a fine not exceeding 100*l.*, and in the case of a second or subsequent conviction to imprisonment, with or without hard labour, for a term not exceeding three months, or to a fine not exceeding 100*l.*, or to both." It is clear therefore that, if this transaction is rendered void under that section upon the ground that the money-lender by merely handing over the money to the borrower at a place other than the money-lender's registered address has carried on business elsewhere than at his registered address in contravention of the section, he is liable, upon proof of the same facts, to a penalty; and if on a subsequent occasion he carries out a moneylending transaction in a similar way, doing everything at his registered address except the mere handing over of the money, he will render himself liable to imprisonment with or without hard labour. I refer to this because it is of some assistance to me, when I have to ascertain the true construction of the Act, to

(1) [1909] 2 K. B. 353, at p. 358.

see what is the punishment provided for a breach of its provisions, and thus more clearly to understand the evil against which it is directed. I am asked in effect to hold that, where the whole of the terms of the loan are arranged at the money-lender's registered address and the security is made out and completed there, the mere fact that the money-lender does not then and there hand over the amount of the loan, but sends a cheque for the amount by post to the borrower, renders the money-lender liable to a penalty for a first offence and to imprisonment for a second offence.

It is, no doubt, possible to say that every part of this particular transaction did not take place at the plaintiff's registered address, but the statute does not say that every detail of each money-lending transaction must be carried out at the registered address; it says that the money-lender "shall carry on the moneylending business at his registered address or addresses, and at no other address." A money-lender may, in my opinion, carry on his moneylending business at his registered address though every single part of the transaction may not be completed there. In my opinion, if he substantially carries out the transaction at his registered address, he complies with s. 2, sub-s. 1 (*b*), of the Act. In support of this view of the section I have the judgment of Phillimore J. in *Levene* v. *Gardner* (1), because in that case the promissory notes were sent to Ireland to one of the defendants, who signed them there, and not at the money-lender's registered address, and they were then sent back to the money-lender, and Phillimore J. came to the conclusion that, notwithstanding that fact, the transaction took place at the registered address, and that there was not a carrying on of the moneylending business at an address other than the registered address. He went on to say that "he did not doubt that it was possible to find otherwise, and to say that to post a letter outside the registered office made the transaction voidable." The learned counsel for the plaintiff, who was also counsel in that case, says—and I think rightly—that the learned judge was speaking ironically and was putting an extreme and absurd case, and in that sense of course it is possible to find almost anything. I think that that decision is

(1) 25 Times L. R. 711.

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Darling J.

right. The words of s. 2, sub-s. 1 (*b*), "shall carry on the money-lending business at his registered address," do not mean that every single part of the transaction must be carried out at the registered address. Here everything was done at the registered address, with the exception of the mere handing over of the cheque. That was sent by post to the defendants at their private address afterwards, for the mutual convenience of both parties, though I do not rely upon this latter circumstance as a necessary element in my judgment. It was received by the defendants and they made no complaint. The Act, therefore, in my opinion, has not been infringed by reason of the manner in which the transaction has been carried out.

[The learned judge then went into the facts and gave judgment for the plaintiff for the 57*l.* advanced with interest at the rate of 50 per cent. per annum from June 18.]

Judgment for the plaintiff.

Solicitors for plaintiff: *Church, Rendell & Co., for F. Kinsey, Manchester.*

Solicitors for defendants: *Kennedy, Ponsonby & Ryde, for Allington, Hughes & Bate, Wrexham.*

W. F. B.

[COURT OF CRIMINAL APPEAL.]

1909
Dec. 2.

THE KING *v.* FISHER.

Criminal Law—False Pretences—Evidence of other Frauds—Admissibility.

At the trial of a prisoner on an indictment charging him with obtaining a pony and cart by false pretences on June 4, 1909, evidence was admitted that on May 14, 1909, and on July 3, 1909, the prisoner had obtained provender from other persons by false pretences different from those alleged in the indictment. The prisoner was convicted:—

Held, that the evidence was wrongly admitted, as it did not shew a systematic course of fraud, but merely that the prisoner was of a general fraudulent disposition, and therefore it did not tend to prove the falsity of the representations alleged in the indictment; that although there was sufficient evidence of the false pretences alleged to justify the conviction, the evidence as to the other cases might have influenced the jury, and the conviction must therefore be set aside.

Appeal against conviction.

At the Cheshire quarter sessions an indictment was preferred against the appellant charging him in three counts with obtaining goods by false pretences, with obtaining credit by false pretences, and with obtaining credit by fraud other than false pretences.

The false pretences alleged in the indictment were that on June 4, 1909, the appellant went to a dairyman named Strong, living at Wallasey, and represented that he wanted to buy a pony and cart for his wife; that his wife was very delicate and could not come to inspect the pony and cart; that if Strong would let him have the pony and cart on hire for seven days he would give Strong a bill for 25*l.* as security; that he would pay Strong 2*l.* for the hire of the pony and cart if he did not keep them; that he banked at Parr's Bank, Limited, Widnes, which bank would give him a good reference; and that the bill for 25*l.* was a good and genuine bill which the appellant would pay when presented in seven days' time.

Evidence was given of the making of these representations and that by means thereof the appellant obtained possession of the pony and cart; that the story about the wife was untrue; that the appellant had had an account at the bank in another name than Fisher, but that the account had been closed before

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June 4; that the appellant had sold the pony and cart a few days after June 4; that he had not paid the 2*l.*; and that the bill for 25*l.* had been dishonoured.

Evidence was also given on behalf of the prosecution that on May 14, 1909, the appellant in the name of Thompson obtained provender to the value of 2*l.* 17*s.* at Warrington by falsely pretending that he was going to start a milk trade and a carting and contracting business, and that he would keep four or five horses; that on July 3, 1909, the appellant in the name of Parker had obtained provender to the value of 1*l.* 8*s.* at Blackburn by falsely pretending that he had stables and horses at a certain address in Blackburn; and that on June 1, 1909, the appellant in the name of Simpson, at Aldford Fair in Lincolnshire, by falsely pretending that he was in the fish trade at Grimsby, obtained possession of a horse on approval, giving a promissory note for 28*l.*, which horse had never been returned, nor had the promissory note been paid.

The jury found the appellant guilty, but stated that as regards the transaction at Aldford Fair they had some doubt whether the evidence could be relied on, and therefore they had not taken it into consideration.

Hugo Marshall, for the appellant. The evidence as to the other cases of obtaining goods or credit by false pretences or by fraud other than false pretences was inadmissible. The false pretences were not the same as those alleged in the indictment, nor were the goods obtained of the same kind, and there was no special connection between those cases and the case charged in the indictment. The evidence did not tend to prove a systematic course of conduct, but that the appellant had a generally fraudulent disposition, and the case is distinguishable on these grounds from *Reg.* v. *Rhodes* (1), *Rex* v. *Wyatt* (2), and *Rex* v. *Bond.* (3)

A. J. Lawrie, for the prosecution. The evidence taken as a whole shews a systematic course of conduct on the part of the prisoner in obtaining horses and provender by false pretences. There is one element common to all the cases, namely, the

(1) [1899] 1 Q. B. 77. (2) [1904] 1 K. B. 188.
(3) [1906] 2 K. B. 389.

absence of any intention to pay for the goods; and the intention not to pay is a sufficient connection between the cases to render the evidence admissible on the principle laid down in the authorities referred to. The evidence was also admissible to prove that when the prisoner obtained the goods charged in the indictment he had a fraudulent mind, and thus it tends to prove the falsity of the representations alleged. [He referred to *Reg.* v. *Jones.* (1)]

The judgment of the COURT (Lord Alverstone C.J., Channell and Lord Coleridge JJ.) was delivered by

CHANNELL J. In this case the appellant was charged on an indictment containing three counts, all of which practically related to the same transaction. The appellant obtained on June 4, 1909, a pony and cart from the owner, saying he wanted it for his invalid wife, and that he would take it on a week's trial; he agreed to pay 2*l.* for the use of the pony and cart for a week if he did not keep it, and as some sort of security for the price he gave a bill of exchange for 25*l.* That was the transaction, and it was proved that his wife was not an invalid and that the whole story was false, and that a reference which he had given to a bank was a useless reference because he had kept the account at the bank in a different name, and, moreover, the account had been closed some time before. The substance of the case for the prosecution was that this was a fraudulent transaction. In the circumstances I should have thought that the evidence was amply sufficient to enable the prosecution to ask the jury to convict the appellant, but the prosecution proceeded to call witnesses to speak to other cases in which the appellant was alleged to have obtained goods by false pretences. In one of those cases the circumstances were very similar to those of the present case, but, as the jury were not satisfied that the appellant was the man concerned in that case, it has no bearing on the present question; otherwise I should have been inclined to think that the evidence as to that case was material and admissible. The other cases of which evidence was given were cases where the appellant had obtained provender by falsely representing

(1) [1898] 1 Q. B. 119.

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in substance that he was carrying on a business and was therefore in a position to pay for goods supplied to him. The question is whether this evidence was admissible on the authority of the cases in which it has been held that evidence is admissible to prove that the prisoner has committed other offences besides the one charged in the indictment. The question is one which has frequently come before this Court and before judges at the assizes, and it is one that is not always easy to decide. The principle is clear, however, and if the principle is attended to I think it will usually be found that the difficulty of applying it to a particular case will disappear. The principle is that the prosecution are not allowed to prove that a prisoner has committed the offence with which he is charged by giving evidence that he is a person of bad character and one who is in the habit of committing crimes, for that is equivalent to asking the jury to say that because the prisoner has committed other offences he must therefore be guilty of the particular offence for which he is being tried. But if the evidence of other offences does go to prove that he did commit the offence charged, it is admissible because it is relevant to the issue, and it is admissible not because, but notwithstanding that, it proves that the prisoner has committed another offence. For example, on a charge of embezzlement, if the defence is that the failure to account for the money is due to a mistake on the part of the prisoner, evidence is admissible to prove other instances of the same kind, because that evidence tends to prove that in the particular case the prisoner had not made a mistake. Another instance is where a person obtains goods by paying for them with a cheque which is subsequently dishonoured, in which case evidence is admissible to prove other cases in which the prisoner has obtained goods by cheques which were dishonoured. In other words, whenever it can be shewn that the case involves a question as to there having been some mistake or as to the existence of a system of fraud, it is open to the prosecution to give evidence of other instances of the same kind of transaction, notwithstanding that the evidence goes to prove the commission of other offences, in order to negative the suggestion of mistake or in order to shew the existence of a systematic course of fraud.

Applying these principles to this case, the charge here is that the prisoner obtained the pony and cart from the prosecutor by making certain statements. The falsity of those statements is not proved by giving evidence that in other cases the prisoner made other false statements, though it does tend to shew that the prisoner was a swindler. But there is no rule of law that swindling is, as regards proof, different from any other offence, and if a man is charged with swindling in a particular manner, his guilt cannot be proved by shewing that he has also swindled in some other manner. We are of opinion that the evidence as to the other cases was inadmissible in this case, because it was not relevant to prove that he had committed the particular fraud for which he was being charged, in that it only amounted to a suggestion that he was of a generally fraudulent disposition. On the other hand, if all the cases had been frauds of a similar character, shewing a systematic course of swindling by the same method, then the evidence would have been admissible.

In the circumstances of this case we cannot come to any other conclusion but that the jury may have been influenced by the evidence of the other cases, and, therefore, although there was sufficient evidence to convict the prisoner without the evidence as to the other cases, in accordance with the rule laid down in this Court, the conviction cannot stand.

Appeal allowed.

Solicitor for appellant: *Registrar of Court of Criminal Appeal.*
Solicitor for prosecution: *Director of Public Prosecutions.*

F. O. R.

1909
Dec. 3.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* GARLAND AND ANOTHER.

Criminal Law—Pleading—Indictment—Receiving—Omission of "feloniously"—Common Law Misdemeanour—Evidence—Conviction—Criminal Procedure Act, 1851 (14 & 15 *Vict. c.* 100), *ss.* 12, 24—*Larceny Act*, 1861 (24 & 25 *Vict. c.* 96), *s.* 91.

An indictment which alleges that the prisoner unlawfully received certain goods well knowing them to have been feloniously stolen, against the form of the statute, &c., but not containing the words "and feloniously" after "unlawfully," is a good indictment for the common law misdemeanour of receiving, and, although the evidence given at the trial on an indictment in that form shews that the stealing was a felony within the Larceny Act, 1861, a conviction on that evidence is, by reason of s. 12 of the Criminal Procedure Act, 1851, a good conviction for the common law misdemeanour.

CASE stated by the Court of quarter sessions for the county of Somerset.

At the Michaelmas quarter sessions for the county of Somerset William Garland the elder and William Garland the younger were put upon their trial before the deputy-chairman and justices upon the following indictment, at the head of which appeared the word "misdemeanour":

"Somerset to wit" The jurors for our Lord the King upon their oath present, that William Garland, senior, and William Garland, junior, between the first day of October in the year of our Lord one thousand nine hundred and eight and the seventeenth day of July in the year of our Lord one thousand nine hundred and nine, one patch box, a revolver and fittings in a wooden case, one and a half yards of green velvet brocade, four brass bed knobs and a quantity of wire nails of the goods and chattels of Samuel Lawrence unlawfully did receive and have, they the said William Garland, senior, and William Garland, junior, at the time when they so received the said goods and chattels as aforesaid then well knowing the same goods and chattels to have been feloniously stolen taken and carried away against the form of the statute in such case made

and provided and against the peace of our said Lord the King his Crown and dignity."

Before the prisoners pleaded to the indictment their counsel moved the Court to quash the indictment on the ground of the omission of the words "and feloniously" after the word "unlawfully" in the indictment. He also contended that the grand jury had not returned a true bill for felony.

After comparing the indictment with s. 91 of the Larceny Act, 1861, the deputy-chairman and justices ruled against the contention of the prisoners' counsel, being of opinion (1.) that the indictment sufficiently followed the words of the statute, (2.) that the felonious intent sufficiently appeared on the face of the indictment, and (3.) that the heading to the indictment was not a portion thereof and should be disregarded.

The prisoners thereupon pleaded not guilty to the indictment. They were given their right of challenge and were given in charge to the jury, and the trial proceeded as in cases of felony.

The jury found both prisoners guilty on the indictment, and their counsel thereupon moved in arrest of judgment.

The deputy-chairman offered to state a case for the consideration of the Court of Criminal Appeal, and counsel for the defence accepted the offer. Sentence was thereupon deferred, and the prisoners were informed that they would be released on bail pending the decision of the Court of Criminal Appeal.

The question for the opinion of the Court was whether the conviction was good and whether the Court of quarter sessions should proceed to sentence the prisoners, or whether the conviction was bad and should be quashed.

Stimson, for the prisoners. Under s. 91 of the Larceny Act, 1861, the receiving of stolen goods is a felony, if the stealing was a felony under that Act or at common law. This indictment alleges that the stealing was felonious, and it follows that the receiving was also felonious. The omission of the word "feloniously," therefore, renders the indictment bad on its face: *Reg.* v. *Gray*. (1)

S. C. N. Goodman, for the prosecution. The conviction can be

(1) (1864) L. & C. 365; 33 L. J. (M.C.) 78.

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supported. Receiving stolen goods, knowing them to have been stolen, was always a misdemeanour at common law. By various statutes, of which the earliest was 3 & 4 W. & M. c. 9, it was made a felony. Now, under s. 91 of the Larceny Act, 1861, it is a felony if the stealing is a felony either at common law or by virtue of that Act; otherwise the receiving is still a misdemeanour. Thus receiving goods stolen by a wife from her husband is not a felony, because stealing by a wife from her husband is not a felony under the Act of 1861 or at common law, but is made a criminal offence by ss. 12 and 16 of the Married Women's Property Act, 1882: *Rex* v. *Payne*. (1) This indictment is a good indictment for the common law misdemeanour, notwithstanding that it contains the words "against the form of the statute, &c." Those words are mere surplusage and can be disregarded: Criminal Procedure Act, 1851 (14 & 15 Vict. c. 100), s. 24; *Rex* v. *Stride*. (2) If the indictment is good for a common law misdemeanour, the fact that the evidence shews that the offence was a felony does not entitle the prisoners to be acquitted of the misdemeanour: see s. 12 of the Criminal Procedure Act, 1851. Further, the old common law misdemeanour of receiving has not been merged in the statutory felony, for the effect of s. 33 of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), is to create a presumption that an offence created by a modern Act is cumulative upon, and not in substitution for, the common law offence: Russell on Crimes and Misdemeanours, 7th ed., vol. 1, p. 6; *Rex* v. *Cross*. (3)

Stimson in reply. The presence in this indictment of the words "well knowing the same goods and chattels to have been feloniously stolen" makes it impossible to treat it as an indictment for misdemeanour, and if those words are struck out no offence is alleged.

The judgment of the COURT (Lord Alverstone C.J., Channell and Lord Coleridge JJ.) was delivered by

CHANNELL J. In this case a technical point, arising from a slip in the form of the indictment, was taken at the trial on

(1) [1906] 1 K. B. 97. (2) [1908] 1 K. B. 617.
(3) (1702) 1 Ld. Raym. 711.

behalf of the prisoners, but the case was tried on its merits and the prisoners were convicted. Therefore the only question we have to consider in this appeal is whether the prisoners are entitled to any benefit by reason of the technical objection. The conclusion we have come to is that the only benefit the prisoners can claim is that hard labour cannot be imposed as part of their sentence.

The question which we have to decide arises from the fact that the indictment does not contain the word "feloniously" as part of the statement of the offence, but it is in exactly the same form as the indictment in *Rex* v. *Payne* (1), except that the indictment in that case did not contain the words which are in this indictment, "against the form of the statute in such case made and provided." Mr. Goodman has, however, referred to a statute, the Criminal Procedure Act, 1851, s. 24, and to a case, *Rex* v. *Stride* (2), which shew that the insertion of those words is immaterial, and we may therefore deal with this case on the footing of the indictment being the same as in *Rex* v. *Payne* (1), where the Court held that the indictment was good in spite of the omission of the word "feloniously," because the offence in that case was the common law misdemeanour of receiving goods knowing them to have been stolen.

By s. 91 of the Larceny Act, 1861, the offence of receiving stolen goods was made a felony only in cases where the stealing was a felony either at common law or under that Act; the section omitted to deal with cases where the stealing might be a felony under some statute other than the Act of 1861, and accordingly in *Rex* v. *Payne* (1), where a married woman had stolen money from her husband, inasmuch as that stealing did not amount to a felony either at common law or under the Larceny Act, 1861, but was made a criminal offence by ss. 12 and 16 of the Married Women's Property Act, 1882, the Court held that the receiving of the stolen property from the wife was not a felony under s. 91 of the Larceny Act, 1861, but was a common law misdemeanour, and the indictment was held to be a good indictment for the common law misdemeanour of receiving. That being so, the indictment in the present case would be a good

(1) [1906] 1 K. B. 97. (2) [1908] 1 K. B. 617.

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indictment for a common law misdemeanour. The facts in this case are, of course, not like those in *Rex* v. *Payne* (1), for the stealing was a felony within the Larceny Act, 1861, and the receiving was, therefore, also a felony. But in the circumstances it seems to us that the case comes directly within the language of s. 12 of the Criminal Procedure Act, 1851. That section provides that "if upon the trial of any person for any misdemeanour it shall appear that the facts given in evidence amount in law to a felony, such person shall not by reason thereof be entitled to be acquitted of such misdemeanour." Now the test of what a man is being tried for is the indictment, and this indictment, as I have said, charges a misdemeanour, and though the facts given in evidence shewed that, the stealing being a felony under the Act of 1861, the receiving was also a felony, s. 12 of the Act of 1851 expressly says that in these circumstances the prisoners are not entitled to be acquitted of the misdemeanour charged in the indictment. We are therefore of opinion that this conviction was a good conviction for a common law misdemeanour.

Mr. Goodman in the course of his argument, which has helped the Court in a case of some difficulty, suggested that even in cases which come within s. 91 of the Act of 1861 the old common law misdemeanour is not merged in the felony created by that section. I am inclined to think that the authorities which he has quoted support that contention, but it is not necessary for us to decide that point.

As we hold that this is a good conviction for a common law misdemeanour, it follows that the sentence must not include hard labour.

Appeal dismissed.

Solicitors for prisoners: *Sweet & Son, Taunton.*
Solicitor for prosecution: *C. P. Clarke, Taunton.*

(1) [1906] 1 K. B. 97.

F. O. R.

MORRIS *v.* CARNARVON COUNTY COUNCIL.

1909
Dec. 8.

Negligence—Local Education Authority—Provided School—Duty to "maintain" School—Dangerous Condition of Premises—Injury to Scholar—Liability of Authority to Action—Education Act, 1902 (2 *Edw.* 7, *c.* 42), *s.* 7.

The plaintiff, a girl aged seven, attended a public elementary school provided by the defendants, the local education authority for the district. Being ordered by a teacher to leave the class-room in which she then was, she proceeded to do so, and while she was passing through the door, which was a heavy swing door with a powerful spring, the door shut upon her fingers and she was seriously injured. The door had been erected by the school board to whom the school had belonged previously to the coming into operation of the Education Act, 1902, and from whom the school had been transferred to the defendants under that statute. The door was in the same condition as it was in when taken over by the defendants, but, owing to its weight and the strength of the spring, it was dangerous and unsuitable for use by young children.

By s. 7 of the above-mentioned Act, "The local education authority shall maintain and keep efficient all public elementary schools within their area."

By Sched. II., par. 1, "The . . . . liabilities . . . . of any school board . . . . existing at the appointed day shall be transferred to the council exercising the powers of the school board":—

Held that, as the door was dangerous if used by young children, the defendants, having invited the plaintiff to use it, were liable at common law for the injury that resulted.

Semble that the word "maintain" in s. 7 refers only to the maintenance of the school as an educational institution, and does not include the physical maintenance of the school buildings, even where the school is a provided school; and that consequently the defendants' neglect to render the door safe did not constitute a breach of their statutory duty under that section.

Ching v. *Surrey County Council*, [1909] 2 K. B. 762, questioned.

Held further by Phillimore J., that the contingency of the school board's negligence in erecting the dangerous door resulting in an accident was not a "liability" which was transferred to the defendants under Sched. II., par. 1, upon their taking over the school.

Appeal from the Carnarvon County Court.

The action was for damages for personal injuries. The defendants are the local education authority for the borough of Bangor, the council of that borough having under the provisions

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of s. 20 of the Education Act, 1902, relinquished to them their powers and duties under that Act. Amongst the public elementary schools provided by the defendants for the said borough is the Glanadda school, which was formerly a board school, and was transferred to the defendants upon the Act coming into operation.

The plaintiff, a girl aged seven, attended the Glanadda school. On the morning of November 4, 1908, she arrived at the school late and entered the class-room. It being contrary to the regulations for a child arriving late to enter the room before the children's names had been called over, the mistress in charge ordered her to leave the room, which she proceeded to do. The door of the room was a heavy swing door with a powerful spring, and as the plaintiff was passing through it it swung back and crushed one of her fingers. The door in question had been erected in 1903 by the school board who were the defendants' predecessors, and at the time of the accident it was in good repair and in the same condition as it was in when taken over by the defendants. The plaintiff in her particulars of claim alleged that the accident was caused by the negligence of the defendants in maintaining as the only means of egress from the class-room a heavy spring door which was dangerous to young children. At the hearing, which took place on May 17, 1909, there was evidence that the headmistress of the school had given instructions to the teachers to assist all children with the door, and had forbidden the children to use the door either for entrance or exit without the assistance of a teacher. The jury found that the defendants were guilty of negligence in allowing the door to remain, and also that the door was not a suitable one for infants when erected in the first instance. The judge was of opinion that the defendants could not be held liable to an action for a mere nonfeasance in omitting to remedy the act of their predecessors, but he was of opinion that the defendants, having by virtue of Sched. II. (1.) of the Education Act, 1902, taken over all the "liabilities" of the school board, as defined by s. 24, sub-s. 3, of the said Act and s. 100 of the Local Government Act, 1888, would be responsible for the consequences of their predecessors' misfeasance in originally erecting

the door. (1) He accordingly allowed the plaintiff to amend the particulars and to add the allegation that the defendants' predecessors, the school board, were negligent in erecting the door, and refused leave to the defendants to plead the Public Authorities Protection Act, 1893. On the particulars as so amended he gave judgment for the plaintiff. The defendants appealed.

Simon, K.C., and *Artemus Jones*, for the defendants. The judge was wrong in allowing the plaintiff to amend her claim and allege a new cause of action, for, even if the "liabilities" of the school board which were transferred to the defendants could be understood as including such a cause of action as this, the remedy was barred by lapse of time by virtue of the Public Authorities Protection Act, 1893, more than six months having elapsed between the injury to the plaintiff and the application for leave to amend. In *Weldon* v. *Neal* (2) it was decided that a plaintiff will not be allowed to amend by setting up fresh claims in respect of causes of action which since the issue of the writ have become barred by the Statute of Limitations, for to allow such amendment would be unjust, as it would deprive the defendant of an existing defence. The same principle was applied in *Steward* v. *Metropolitan Tramways Co.* (3) to an application to amend a defence, where the effect of the amendment would have been to bar the plaintiff's remedy against the local authority who according to the amended defence were the parties liable,

(1) By s. 7, sub-s. 1, of the Education Act, 1902, "The local education authority shall maintain and keep efficient all public elementary schools within their area which are necessary."

By Sched. II., par. 1, "The property powers rights and liabilities . . . . of any school board or school attendance committee existing at the appointed day shall be transferred to the council exercising the powers of the school board."

By s. 24, sub-s. 3, "In this Act the expressions 'powers' 'duties' 'property' and 'liabilities' shall, unless the context otherwise requires, have the same meanings as in the Local Government Act, 1888."

By s. 100 of the Local Government Act, 1888 (51 & 52 Vict. c. 41), "The expression 'liabilities' includes liability to any proceeding for enforcing any duty or for punishing the breach of any duty, and includes all debts and liabilities to which any authority are or would but for this Act be liable or subject to, whether accrued due at the date of the transfer or subsequently accruing."

(2) (1887) 19 Q. B. D. 394.

(3) (1885) 16 Q. B. D. 178.

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inasmuch as the statutory period within which notice of action had to be given to the local authority had elapsed. If the judge allowed the amendment, he ought equally to have allowed the defendants to plead the Public Authorities Protection Act, 1893. But apart from the fact of the six months' limitation having run the defendants are not responsible for the misfeasance (if any) of their predecessors in erecting the door, for the "liabilities" of those predecessors did not include the possibility of a future damage resulting from an act done before the transfer. The definition of the term in the Local Government Act, 1888, was not intended to cover such a cause of action as this. Secondly, the judgment below cannot be supported upon the ground that the defendants in allowing the door to remain as it was were guilty of a breach of their statutory duty to "maintain" the school.

[PHILLIMORE J. Does the word "maintain" in s. 7 refer to physical maintenance at all? The language of the section suggests the contrary, for it provides that in the case of non-provided schools the local education authority shall maintain the school only so long as the managers of the school "keep the school-house in good repair" (see sub-s. 1 (*d*)), which looks as if maintenance meant a different thing from repair.]

It must be admitted that the case of *Ching* v. *Surrey County Council* (1) is a direct authority against that suggestion, and that it consequently cannot be disputed in this Court that maintenance includes physical maintenance. But the answer to that case is twofold. In the first place, assuming that the defendants were guilty of a breach of duty in not maintaining the door, the plaintiff's remedy was not by action, but by complaint to the Board of Education under s. 16.

[PHILLIMORE J. But *Ching's Case* (1) is against you on that point, for there was held to be a remedy by action.]

The point was not there taken. And. secondly, the defendants were not guilty of any breach of their statutory duty, for all that they were bound to do in that respect was to keep the premises in as good a condition as that in which they received them. In *Ching's Case* (1) the plaintiff was hurt by a fall in consequence of his tripping over a hole in the asphalte paving of the school

(1) [1909] 2 K. B. 762.

playground. But there the hole was of recent origin and had come into existence during the defendants' ownership of the school. They had neglected to keep the premises in a proper state of repair.

Boxall, K.C., and *R. A. Griffith*, for the plaintiff. There is a sufficient cause of action in the original particulars to support the judgment below, and the plaintiff is not driven to rely on the amendment. The case of *Ching* v. *Surrey County Council* (1) is on all fours with the present case and is a direct authority that a failure to keep the premises in a safe condition for the children attending the school is a breach of the duty to maintain it, for which breach an action will lie. The words "shall maintain and keep efficient" are copied from the Education (Scotland) Act, 1872 (35 & 36 Vict. c. 62), s. 36, and under that section it was held in *Cormack* v. *School Board of Wick and Pulteneytown* (2) that the school board were liable to one of the school children who was injured by the fall of a gate which was in a defective condition. But, further, the defendants are liable by the common law. They had invited the plaintiff to use the door, which was in the nature of a trap or concealed source of danger. Although there was no necessity for the plaintiff to amend her particulars, still the judge ought to have allowed the amendment, for the Public Authorities Protection Act, if it had been pleaded, would not have availed the defendants. The amendment, although it was in one sense an enlargement of the claim, did not put forward a wholly new cause of action. In both sets of particulars the claim was substantially the same, namely, for injury resulting from the defendants having upon the premises a door which by reason of its weight and the strength of the spring was unsafe for young children to use. In *Weldon* v. *Neal* (3) the action sought to be set up by the amendment was a wholly new one, the original claim having been for slander ,and the amended claim being for assault and false imprisonment. The two cases are not parallel. The fact of the defendants being sued for the same matters in a different character, as transferees of other tort-feasors' liabilities instead of as being themselves the actual tort-feasors, does not alter the nature of the cause of action. Then, if

(1) [1909] 2 K. B. 762. (2) (1889) 16 R. 812.
(3) 19 Q. B. D. 394.

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that be so, the defendants are liable for the consequences of their predecessors' act. The definition of "liabilities" in s. 24, sub-s. 3, of the Act of 1902 and s. 100 of the Local Government Act, 1888, shews that the defendants took over all liabilities, including liabilities in tort, which the school board would but for the Act of 1902 have been subject to, "whether accrued due at the date of the transfer or subsequently accruing."

Simon, K.C., in reply.

DARLING J. In this case it appears that before the defendants, who are the local education authority for the borough of Bangor, took over the Glanadda school a swing door had been erected at the entrance to a class-room which was used by very young children. The plaintiff, a little girl aged seven, entered this class-room under circumstances which rendered her entrance a breach of the school regulations, and a teacher who was in charge told her to go out of the room. Obedience to that order necessitated the child's opening the swing door for herself, as no one opened it for her. Therefore she was invited to use that swing door, indeed she was more than invited, for she was commanded to do so by a person whose orders she was bound to obey. The child proceeded to do as she was told, and endeavoured to push the door open, with the result that the door, which had a powerful spring for the purpose of closing it, swung back before she could get her hand off it and crushed her finger. An action was brought on her behalf for this injury, and the jury found that the defendants were guilty of negligence in allowing the door to remain. They also said, in answer to a further question by the judge, that they did not consider the door a suitable door for infants when erected in the first instance. Mr. Boxall contends that upon those findings there is enough to bring the case within the ordinary rule that an owner of premises upon which he invites other persons to come must not allow the presence upon the premises of anything in the nature of a hidden or concealed source of danger, or what in cases of this description is commonly called a trap. In order to determine whether the present case comes within that principle one must have regard not only to the nature of the thing itself, but also to the class of

persons who are invited or compelled to use it, and one must have regard to the knowledge, judgment, and physical strength of those persons. What the law considers a concealed danger is not confined to things hidden from the eye alone; it extends to things hidden from the appreciation of the person injured, hidden from the combination of eyesight and knowledge of the properties of the things which the eyesight observes. It is not enough here to say that this was a swing door and that the child could see it was a swing door. No doubt the child could see that it was a swing door, but she did not know what that fact involved, or what the consequences of her using it might be. The findings of the jury must be taken to mean that the plaintiff did not know what were the concealed and hidden dangers of that swing door, and that to a child of her age, with only the knowledge and strength that a child of that age would possess, the door was a trap in the sense in which that word is used in the cases with which we are all familiar; that it was a trap when originally put up, and that the defendants had done nothing to alter its condition. Now a person whose premises are dangerous is not only liable if he caused them to be so, but also if, having taken them over in a condition in which they amounted to a trap, he has omitted to remedy that condition. The omission to remedy it is his negligence, and is distinct from the negligence of the person who first brought the dangerous state of things into existence. On this ground I think that the judgment of the county court judge can be supported. It was also contended that the defendants were liable upon other grounds. It was said that they had failed to "maintain and keep efficient" the school in accordance with the provisions of the Education Act, 1902. But I have the greatest doubt, notwithstanding the decision of Bucknill J. in *Ching* v. *Surrey County Council* (1), whether that section applies to the maintenance of the fabric of the school at all, and whether its application is not confined to the maintenance of the school in the sense of an institution for teaching as distinguished from a school in the sense of a school-house. The distinction between school and school-house seems to be drawn in this very section, s. 7, which by sub-s. 1 (*d*) enacts that "The

(1) [1909] 2 K. B. 762.

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managers of the school shall provide the school-house free of charge . . . . to the local education authority for use as a public elementary school, and shall out of funds provided by them " (the managers) " keep the school-house in good repair." But it is not necessary for the purposes of the present case either to follow or to differ from the decision of Bucknill J., though, if it were necessary, I should have grave doubts whether that case was rightly decided. It was also further contended on behalf of the plaintiff that the defendants were liable as the transferees of the liability of their predecessors, the school board, for the original negligence in providing a door of this description, and it was upon this ground alone that the county court judge gave judgment in the plaintiff's favour. But that ground of liability was not alleged in the original particulars and could only be put forward as the result of an amendment, and as the statement of it amounted to the setting up of a new cause of action, the judge ought not to have allowed the amendment without also allowing the defendants to plead the Public Authorities Protection Act and set up as a defence that the new claim was barred by lapse of time. This seems to be conclusively established by the cases of *Weldon* v. *Neal* (1) and *Steward* v. *Metropolitan Tramways Co.* (2) But although the judgment of the county court judge cannot, in my opinion, be supported upon the grounds upon which he rested it, I think it can well be supported upon the ground which I have stated above. I think the appeal should be dismissed.

PHILLIMORE J. I am of the same opinion. I agree with the counsel for the defendants that the amendment of the plaintiff's particulars ought never to have been allowed, for if the judge allowed the amendment he ought also to have allowed the defendants to plead the Public Authorities Protection Act, in which case the amendment would have been futile. I also agree that the amendment could not in any case avail the plaintiff, as the cause of action which it set up was bad in point of law. The dangerous door which was put up by the school board led to no accident during the time that the board were in possession of the premises, and in my opinion it cannot be right to hold that

(1) 19 Q. B. D. 394. (2) 16 Q. B. D. 178.

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the contingency of its causing an accident subsequently to the transfer of the school to the defendants was a "liability" which was transferred to them under Sched. II., par. 1, of the Education Act, 1902. I also agree that the other cause of action that was alleged to arise out of the Education Act, namely, that the defendants failed to "maintain and keep efficient" the school in accordance with s. 7, was equally ill-founded. With the conclusion of Bucknill J. in the case of *Ching* v. *Surrey County Council* (1), if and so far as he rested his judgment upon the obligation to maintain the school and keep it efficient, I respectfully disagree. The more I consider the language of that section the more I am satisfied that it means that the authority are to maintain and keep it efficient as an institution. But I am of opinion that there is a good cause of action in this case against the defendants wholly outside the statute, a liability which attaches to them not as an education authority, but as the owners of premises which are dangerous and upon which they have invited the plaintiff to come. There is a duty upon persons who invite others on to their premises to take care that the premises are not in a dangerous condition; and if that be true of what I may call their static condition, where the danger arises from the position of things as they stand without anything being moved, a fortiori is there a duty upon the owners to take care when they invite others to deal with something movable upon the premises the moving or dealing with which may be productive of mischief. Here this child, being on the school premises by invitation, is directed to use a swing door which happens to be dangerous for so young a child to use, and damage happens in consequence. For that damage I am of opinion that the defendants are responsible. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Peacock & Goddard, for S. N. Dewalo, Bangor.*

Solicitors for defendants: *Huntley & Son, for Davies & Davies, Carnarvon.*

(1) [1909] 2 K. B. 762.

J. F. C.

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COPE *v.* SHARPE.

Trespass—Justification—Act done in Preservation of Property—Extinguishing Fire.

If a fire breaks out on land, the tenant of the sporting rights is entitled to adopt such means on the land for extinguishing the fire as may in the circumstances be necessary for the preservation of his sporting rights.

Appeal from the Basingstoke County Court.

The plaintiff was the owner of certain land in Hampshire. The defendant was head gamekeeper of a Mr. Chase, to whom the plaintiff had let the shooting on the land in question. At the date of the trial the tenancy agreement had not been signed, and for the purpose of the trial the tenancy, which commenced on February 1, 1909, was treated as being under a verbal agreement, the terms of which entitled the tenant and his keepers to be on the land for all purposes connected with the breeding, preservation, and shooting of the game. On April 21, 1909, a fire of considerable dimensions broke out in the heather on the land in question. Whilst persons in the employment of the plaintiff were engaged in endeavouring to put out the fire, the defendant came on to the land and, thinking that the means employed by the plaintiff's men would not be successful in putting out the fire, proceeded to set fire to certain strips of heather on the land to the leeward of the approaching conflagration, in order that the fire might be checked when it reached the places where the strips of heather had already been burnt down by him.

The plaintiff brought this action to recover damages for trespass committed by the defendant in setting fire to the strips of heather, and for an injunction.

The county court judge did not find as a fact whether the act of the tenant in setting fire to the strips of heather was or was not necessary for the protection of his employer's rights as tenant of the shooting, but he held that the defendant had committed a trespass, and he gave judgment for the plaintiff for 5*s.* damages and for an injunction to restrain the defendant from lighting any more fires on the plaintiff's land.

The defendant appealed.

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St. Gerrans (*Nolan* with him), for the defendant. The defendant was not a trespasser. As the servant of the tenant of the sporting rights he was entitled to be on the land, and when the fire broke out, and it did not appear that the plaintiff's servants were able to get it under control, the defendant was entitled to take what he considered to be the reasonable and proper steps for checking the fire. The defendant was not bound to stand by and see his master's property destroyed. [He referred to the Year Book 9Edw. 4, 35 b, pl. 10.]

Acland, K.C. (*Chute* with him), for the plaintiff. Prima facie the act of the defendant in setting fire to the heather on the plaintiff's land was a trespass. The onus was on the defendant to justify it, and, assuming that he could justify it by shewing that but for his action his employer would have suffered some loss, it is clear that the county court judge was not satisfied that the suggested justification had been made good in fact. The defendant having failed to discharge the onus which lay upon him, judgment was rightly given for the plaintiff.

The rights of the defendant's employer over the land were only such as were incidental to sport, and did not include the right to put out fires, and the defendant was in no better position than any other member of the public, who certainly is not entitled to enter private premises for the purpose of putting out a fire: *Carter* v. *Thomas*. (1)

[PICKFORD J. There is a passage in the judgment of Kennedy J. in that case which is against you.]

DARLING J. The circumstances of this case are somewhat peculiar and raise questions of difficulty which have not in recent times come before the Courts. It appears that the defendant is the head gamekeeper of a Mr. Chase, who has the right of preserving and shooting the game on the plaintiff's land. For the purposes of my judgment I propose to treat the case as if the defendant were Mr. Chase himself. On April 21 the heather on this land and also on the adjoining land was on fire, and a number of men in the plaintiff's employ were engaged in trying to put out the fire. The defendant came upon the

(1) [1893] 1 Q. B. 673.

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land, and apparently was of opinion that the means they were adopting would be ineffectual, and he therefore proceeded to adopt another method of dealing with the fire. He set fire to the heather in different places with the intention of making bare patches of ground by means of a fire which he could control, so that when the fire which was not under control reached those bare patches its further progress would be checked. The plaintiff brought this action against the defendant, alleging that the defendant by setting fire to the heather in this manner had committed a trespass. The county court judge gave judgment for the plaintiff for 5*s*. damages and an injunction.

There is some old authority for saying that in certain cases a man can justify the commission of a tort on the ground of necessity. In *Maleverer* v. *Spinke* (1) it was stated that "We will well agree that in some cases a man may justify the commission of a tort, and that is in cases where it sounds for the public good; as in time of war a man may justify making fortifications on another's land without licence; also a man may justify pulling down an house on fire for the safety of the neighbouring houses; for these are cases of the common weal." Then there is a case in the Year Book 9 Edw. 4, p. 35, pl. 10, where Littleton J. said: "Et mesme le ley si home per negligence suffra son meason d'arder, jeo que sue son vicin puisse debrus. son meason pur eschue le peril que poet aveñ a moy per l'arder, car si jeo suffra (2) le meason d' estoier, il purr arder que jeo ne puisse queincher le fewe apres." The learned judge was therefore of opinion that a man might knock down an intervening house which was not his property in order to prevent his property from being damaged by the spreading of the fire; and there is the dictum of Kennedy J. in *Carter* v. *Thomas* (3), which Pickford J. referred to in the course of the argument, which shews that Kennedy J. was inclined to adopt this view.

But I do not think that in the circumstances of this case it is necessary to rely on the doctrine expressed in these

(1) (1538) Dyer, 35 b, 36 b.

(2) *Sic.*: probably this and other words are corruptly printed.

(3) [1893] 1 Q. B. 673.

authorities to its full extent, for one of the facts in this case is that the defendant is the servant of a man who had rights over the land on which the alleged trespass was committed. He had been granted the right to breed and shoot game on the land, and he, and the defendant as his keeper, had the right to put upon the land such things as were necessary for the preservation of the game. It is plain that he might set traps necessary for that purpose, and he might remove the heather round the coops where the young gamebirds were kept if the presence of the heather was a danger to them. In short, he might do all the usual and necessary things which a tenant of a shooting may do. That being so, can it be said that if the heather catches fire he is not entitled to do everything that is necessary in order to preserve the game from destruction by the fire? It would not be possible to remove the game, and, therefore, the only alternative would be to put out the fire. The county court judge, although he decided against the defendant, appears to have assumed that he might have been entitled to put out the fire by throwing water on it or by stamping on the burning heather; but those acts would in law constitute a trespass, just as much as what the defendant in fact did, unless they could be justified by the defendant. What the defendant did was to burn the heather on one portion of the land solely with the object of preserving it in another part, and in my opinion the question whether the defendant was entitled to burn the heather which he did burn depends on whether it was necessary to do so in order to preserve the enjoyment of the rights over the land which had been granted by the plaintiff to his employer. If the defendant's act was necessary for that purpose, I think he committed no trespass; if it was not necessary, he did commit a trespass.

I cannot find in the judgment of the county court judge anything to shew that he ever addressed his mind to this question, and as he has not found the facts necessary for the determination of the question, there must be a new trial.

PICKFORD J. I agree. It is not necessary for me to repeat what Darling J. has said as to the old authorities, but I will read the passage from the judgment of Kennedy J. in *Carter* v.

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Thomas (1): "The contention on behalf of the appellant would lead to this conclusion, that any one in Hounslow might have gone on to the premises, and done what he thought expedient for the purpose of extinguishing the fire. We must assume that the firemen of the local board were on the premises with the consent of the owner, and, if so, what right had the appellant to force an entrance? I can conceive circumstances under which such an act might be justifiable; as, for instance, if it were necessary in order to save life, or perhaps also if there were an insufficient force on the premises for the purpose of extinguishing the fire, or if the duty of the persons employed in doing so were being neglected, and danger to life or property were the result."

Kennedy J. seemed inclined to think that, in the cases he mentioned, any member of the public might enter on private premises and commit a trespass for the purpose of extinguishing the fire. In the present case the suggestion put forward on behalf of the defendant is that the means employed by the plaintiff's men to put out the fire were useless, and that it therefore became necessary for the defendant to adopt his method in order that the rights of his employer might be preserved. If that were proved, it would bring the case exactly within the passage from Kennedy J.'s judgment which I have read. The county court judge apparently was of the opinion that, no matter what the defendant's necessity, and even if his act of setting fire to the strips of heather were the only possible way of preventing the loss of that which had been granted to his master by the plaintiff, still the act was a trespass for which there could in law be no justification. In my opinion there is no authority for saying that that is the law; on the contrary, in my opinion, if it can be shewn that the steps taken by the defendant to check the fire were the only possible means available for the preservation of his master's rights under the agreement, there is authority for saying that the defendant's act was not a trespass.

I express no opinion as to whether the evidence at the trial shewed the existence of a state of things which justified the defendant's act, for, as there is no finding of fact by the

(1) [1893] 1 Q. B. 673.

county court judge on this question, the case must go for a new trial.

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Appeal allowed. New trial ordered.

Solicitors for plaintiff: *Johnson, Weatherall & Sturt, for Lamb, Brooks & Co., Basingstoke.*

Solicitors for defendant: *Walker & Rowe, for E. T. Close, Camberley.*

F. O. R.

[IN THE COURT OF APPEAL.]

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Nov. 27, 29, 30.

LOWERY *v.* WALKER.

Negligence—Savage Animal—Liability of Owner to Trespassers.

The defendant, a farmer, occupied a field which adjoined a railway station, and was divided from a footpath by a wire fence. He put into this field a horse which he knew to be bad tempered and to have bitten persons. Members of the public had previously, to the defendant's knowledge, for many years habitually crossed the field without leave, for the purpose of making a short cut from a point on the footpath, where they got over the fence, to a gate near the station. The defendant had warned off persons crossing the field and had complained to the police of persons so crossing as trespassers, but had refused to take legal proceedings against any of them for trespass, assigning as a reason that some of them were his customers for milk. The plaintiff, while so crossing the field without leave from the defendant, was bitten by the horse:—

Held by Vaughan Williams L.J. and Kennedy L.J. (Buckley L.J. dissenting), that the fact that the defendant knew that the public habitually crossed the field without leave as above mentioned did not, under the circumstances, impose upon him towards persons so crossing any duty not to keep an animal such as the horse in question in the field, or to take any care for their protection from risk of being injured by it, and that the defendant was, consequently, not liable to the plaintiff in respect of the injuries sustained by him.

Decision of Divisional Court (reported [1909] 2 K. B. 433) affirmed.

APPEAL from the judgment of a Divisional Court (Darling J. and Pickford J.) upon an appeal from the Whitehaven County Court.

The action in the county court was for personal injuries

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occasioned to the plaintiff through being bitten, knocked down, and trampled upon by a horse which belonged to the defendant, under the following circumstances. The defendant, a farmer, had put the horse by which the plaintiff was injured into a field, of which he had been the occupier for fifteen years, adjoining a railway station. The field was divided from a footpath by a wire fence. It appeared from the evidence that the horse had been put there from time to time for at least three years before the plaintiff was injured as aforesaid. There was evidence to the effect that, for the purpose of making a short cut, members of the public had, for a period of between thirty and forty years previous to the action, habitually crossed this field from a point on the footpath, where they got over the fence, to a gate near the station, and that there was a trodden track from that point to the gate, which was usually unlocked, but was occasionally kept locked. The plaintiff was crossing the field by this track, when he was injured by the horse as above mentioned. He had no leave to cross the field from the defendant. The horse had previously bitten or attacked other persons, and the county court judge found that the defendant knew that this was the case and that the horse was dangerous. The defendant and his son stated in evidence that they had frequently shouted at persons crossing the field as aforesaid, and sometimes turned them back; and that they had complained to the police of persons so crossing, as trespassers, and the defendant had been advised by the police to prosecute persons who had done so, but had declined to take proceedings against them on the ground that they were customers of his for milk. There appeared to have been at one time a notice board put up by the defendant warning people not to trespass on the field. It was submitted by the advocate who appeared for the defendant to the county court judge that, the plaintiff being a trespasser, the action would not lie.

The county court judge gave judgment for the plaintiff for 100*l.* damages and made a note of his decision in his note-book in the following terms :—"I find that this field had been habitually used by the public as a short cut, though they had no leave, and no doubt the plaintiff was a trespasser. I find as a

fact defendant knew the horse had bitten other people. I think the defendant was guilty of negligence in putting a horse he knew to be dangerous into a field which he knew was habitually used by the public. The defendant was bound to keep safe a horse he knew to be ferocious; he did not do so and is liable." The judgment was given and the above note made on December 14, 1908. It appeared that on January 1, 1909, before the notice of appeal was given, the judge had added to the original note of his judgment a note in the following words:—"On the question of trespass I came to no definite conclusion. The defendant only occupied for fifteen years. I had evidence of the use of the path for thirty or forty years. The defendant put up a notice fifteen years ago, but would not prosecute."

The Divisional Court on appeal reversed the decision of the county court judge. (1)

Holman Gregory, for the plaintiff. Although the plaintiff was a trespasser, the county court judge has found as facts that the defendant knew that the public habitually used the field and that the horse was a dangerous one. The keeping of a dangerous animal is a wrongful act: *Baker* v. *Snell* (2); and there is no difference in principle between the case of a person who lays a spring gun, by which he intends that trespassers shall be injured, and the case of a dangerous horse which the owner knows will bite persons who trespass in the field where the horse is kept. In the case of a spring gun the owner of it is liable if a trespasser is injured: *Bird* v. *Holbrook* (3); and in *Brock* v. *Copeland* (4) Lord Kenyon referred to a case where the owner of a close suffered the way over it to be used as a public one, and it was held that the owner was liable for injuries suffered by a person so using it from a dangerous animal. Lord Kenyon's statement in *Brock* v. *Copeland* (4) was cited with approval by Gibbs C.J. in *Deane* v. *Clayton*. (5) In *Reg.* v. *Dant* (6) a commoner turned out on a common, across which there were public footpaths, a horse which he knew to be

(1) [1909] 2 K. B. 433.
(2) [1908] 2 K. B. 825.
(3) (1828) 4 Bing. 628.
(4) (1794) 1 Esp. 203.
(5) (1817) 7 Taunt. 489, at p. 532.
(6) (1865) 34 L. J. (M.C.) 119.

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vicious, and the horse kicked and killed a child; it was held that the commoner was liable to be convicted of manslaughter, even though the child was not on the public footpath at the time when she was kicked, the reason being that the act of turning out a vicious horse in a place where the public will go, whether rightfully or not, is an unlawful act, an act of culpable negligence. The same principle is involved in the decision in *Gallagher* v. *Humphery* (1) and was recognized in *Barrett* v. *Midland Ry. Co.* (2) and in *Murley* v. *Grove.* (3) In *Barnes* v. *Ward* (4) Maule J. said that a trespasser may have a right of action. The principle to be deduced from the authorities is that, when a landowner knows that persons are in the habit of trespassing on his land, he must not do anything which will expose them to something which is not one of the ordinary risks incident to the user of the property. A trespasser does not take all risks, but only such risks as are likely to occur in the ordinary course of nature, which risks do not include a liability to be injured by a spring gun or to be attacked by a savage animal. The present case is really on all fours with *Cooke* v. *Midland Great Western Railway of Ireland* (5), the only difference being that there the plaintiff was a child; that does not affect the principle, but only the extent to which the owner of the dangerous animal or thing ought to anticipate that a member of the public will be likely to place himself in the position of danger. On the findings of fact in this case the plaintiff is entitled to recover.

Leslie Scott, K.C., and *H. L. Beazley*, for the defendant. For the purposes of this appeal the case must be dealt with on the footing that the plaintiff was a mere trespasser. The case was conducted in the county court and in the Divisional Court entirely on that basis. Leaving out of the question for the moment the evidence of objection taken by the defendant to persons trespassing on the field, and assuming that mere absence of such objection might, under certain circumstances, be ground for inferring a licence given by a landowner to persons crossing his land, it is clear that the county court judge did not base his

(1) (1862) 10 W. R. 664.
(2) (1858) 1 F. & F. 361.
(3) (1882) 46 J. P. 360.
(4) (1850) 9 C. B. 392.
(5) [1909] A. C. 229.

judgment at the trial on any such inference. In the note of his decision which he made at the trial he finds expressly that the public used to cross the field without leave, and that the defendant was a trespasser. The alteration subsequently made by the county court judge in his note cannot be regarded for any purpose. At the time when it was made the judge was functus officio as regards the case. Sect. 120 of the County Courts Act, 1888, provides that the county court judge shall at the trial, if required, make a note of any question of law raised, and of the facts in relation thereto, and of his decision thereon; and s. 121 clearly shews that he is bound by the note so made by him. The point of law taken at the trial in this case was whether the plaintiff, being a trespasser, could recover; the question whether he was a trespasser was fundamental to that point. See on this point *Irving* v. *Askew* (1); *Robinson* v. *Fawcett*. (2) The Divisional Court rightly decided that no action lay, and the reasons given for their decision are correct. In determining cases of this class, the only criterion known to the law is that stated by Gibbs C.J. in *Deane* v. *Clayton* (3), namely, had the plaintiff any right to be at the place where he was injured? Putting aside cases of intentional injury, like those in which spring guns were used, cases of nuisances adjoining a highway, of which *Barnes* v. *Ward* (4) is an example, and cases of children, a trespasser who sustains injuries while trespassing has no right of action; and on an analysis of the authorities it will be found that no case can be cited in which under such circumstances as these a trespasser has recovered. The terms "licensee" and "trespasser" are mutually exclusive, and a man cannot be both a trespasser and a licensee. Mere acquiescence by a landowner in trespassing does not impose on him any special duty towards the trespassers: *Harrison* v. *North Eastern Ry. Co.* (5) A licence cannot be inferred from mere passive acquiescence in the sense that no objection is made, and no active steps are taken, by a landowner by way of preventing trespass. In this case the plaintiff, if he had been sued for trespass, could not

(1) (1870) L. R. 5 Q. B. 208.
(2) [1901] 2 K. B. 325.
(3) 7 Taunt. 489.
(4) 9 C. B. 392.
(5) (1874) 29 L. T. 844.

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possibly have defended himself on the ground of licence. There are some dicta, no doubt, in cases on this subject, which are not altogether easy to reconcile with the decisions in other cases; but, even assuming, as has been in some cases suggested, that a duty towards trespassers on the part of a landowner might arise by reason of conduct on his part encouraging them to think that he had no objection to their coming on his land, this case cannot be treated as coming within the category of such cases; for here the evidence clearly shewed that the defendant's conduct was not such as can be described as "acquiescence" in any sense in the public crossing his land, or as an encouragement to them to do so. He had warned people off the field, and had frequently complained to the police on the subject. The mere fact of his not taking legal proceedings against any individual cannot be treated as amounting to acquiescence in the trespasses committed. It clearly could not be said in this case that the defendant had invited the plaintiff to come on his land, so that the authorities as to an obligation in such a case on the part of the inviter to warn the person invited against hidden dangers, such as *Indermaur* v. *Dames* (1), do not apply. It is, no doubt, the duty of a person who owns an animal, which to his knowledge is dangerous or mischievous, to keep it in; and he keeps it at his peril in the sense that, subject to certain exceptions, such as the plaintiff's own default or vis major or the act of God, if it escapes, even without any negligence on his part, he is responsible for any damage it may do: *Fletcher* v. *Rylands.* (2) But it is submitted that the mere fact of keeping such an animal cannot be regarded as per se unlawful, as appears to have been suggested by some of the observations of Cozens-Hardy M.R. and Farwell L.J. in *Baker* v. *Snell.* (3) In this case there was no question of the defendant's not keeping the horse in, or of its escaping; the plaintiff brought his injuries on himself by trespassing on the field where the animal was kept in by the defendant: *Ponting* v. *Noakes.* (4) The decision in *Cooke* v. *Midland Great Western Railway of Ireland* (5), when

(1) (1866) L. R. 1 C. P. 274; (1867) L. R. 2 C. P. 311.

(2) (1866) L. R. 1 Ex. 265; (1868) L. R. 3 H. L. 330.

(3) [1908] 2 K. B. 825.

(4) [1894] 2 Q. B. 281.

(5) [1909] A. C. 229.

analysed, is of somewhat narrow application. The question there arose with regard to a child, and the only question was whether there was some evidence for the jury to shew that the defendants, knowing, as they must be taken to know, that children were inquisitive and mischievous, and therefore likely to meddle with the machinery there in question, had in effect attracted or invited the plaintiff to do so, by leaving their premises in such a state as to afford access to it. That case has no analogy to that of an adult trespasser who trespasses in order to make a short cut. [They also cited *Jordin* v. *Crump* (1); *Farrant* v. *Barnes* (2); *Southcote* v. *Stanley* (3); *May* v. *Burdett* (4); *Sarch* v. *Blackburn* (5); *Wilson* v. *Newberry* (6); *Box* v. *Jubb* (7); *Stiles* v. *Cardiff Steam Navigation Co.* (8); *Hardcastle* v. *South Yorkshire Ry. Co.* (9); *Great Northern Ry. Co.* v. *Harrison* (10); *Corby* v. *Hill* (11); *Binks* v. *South Yorkshire Railway and River Dun Co.* (12)]

Holman Gregory, for the plaintiff, in reply. The finding on the question whether the plaintiff was a trespasser was not really material to the judgment of the county court judge, and upon his other findings the plaintiff was entitled to judgment. It is submitted that it is clear both on principle and authority that, where the owner of land knows people to be in the habit of coming upon his land, he must not without warning place on the land unusually dangerous animals or things such as would not in ordinary practice be found there. The cases as to spring guns, such as *Bird* v. *Holbrook* (13), shew that this is so. [He cited *Gautret* v. *Egerton.* (14)]

VAUGHAN WILLIAMS L.J. I think that in this case, upon the facts as found by the county court judge, and as appearing from the evidence given at the trial, there was not shewn any such duty on the part of the defendant towards the plaintiff as would support

(1) (1841) 8 M. & W. 782.
(2) (1862) 11 C. B. (N.S.) 553.
(3) (1856) 1 H. & N. 247.
(4) (1846) 9 Q. B. 101.
(5) (1830) Moo. & M. 505.
(6) (1871) L. R. 7 Q. B. 31.
(7) (1879) 4 Ex. D. 76.
(8) (1864) 33 L. J. (Q.B.) 310.
(9) (1859) 28 L. J. (Ex.) 139.
(10) (1854) 23 L. J. (Ex.) 108.
(11) (1858) 4 C. B. (N.S.) 556.
(12) (1862) 3 B. & S. 244, at p. 252.
(13) 4 Bing. 628.
(14) (1867) L. R. 2 C. P. 371.

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the action brought by the plaintiff. We have had cited to us a number of cases. I do not say that all those cases are precisely in accord with one another, but I think that the majority of them support the view which I am now expressing. According to my view of the matter it is impossible in such cases to lay down any hard and fast rule. Each case must be decided upon its own circumstances. Under the old system of pleading—and I think in substance the same rule applies to pleading under the Judicature Acts—the plaintiff could not recover merely by alleging generally that the defendant owed a duty to him; he was bound to allege and prove facts from which such a duty would in law arise. So here, in arriving at a judgment in this case, we must look at the facts of the particular case which we have before us, in order to see whether upon those facts any duty arose on the part of the defendant towards the plaintiff, of which the defendant was guilty of a breach, by leaving this horse, being a horse of fierce temper, in the field which the plaintiff was crossing when he received the injuries of which he complains. Now what are the facts of this case? Of course it is common knowledge that, in so far as the county court judge has found the facts, his findings are binding upon us. I do not say this as necessarily indicating that I should not have arrived at the same findings myself, but, whether I should or not, his findings are binding upon me. This is his finding as stated in the note which he made at the time of giving judgment: "I find that this field had been habitually used by the public as a short cut, though they had no leave"; and then, as his note originally stood, before the alteration which he subsequently made, he says this: "and no doubt the plaintiff was a trespasser." I think that is a statement of fact, which not only binds us, but also binds the county court judge. As I understand, what happened with regard to the alteration of his note was this: The judge in the first place delivered an oral judgment; and then, on the same day, at or about the time of delivering judgment, he made an entry in his note-book of the judgment which he had just delivered in the words which I have read. There is no suggestion made that the words of this note are not exactly to the same effect as the words which he used in his oral judgment. But, after

the lapse of some time, namely, on January 1, 1909, he made the alteration in his note to which our attention has been called. In my opinion he was then functus officio as regards this case, and had no right to make that alteration. I do not propose to go in detail through the arguments and authorities which the defendant's counsel presented to us on this point, but I think that ss. 120 and 121 of the County Courts Act, 1888, and the cases cited to us by him do shew that the alteration in the judge's note of his decision was of such a character, and made at such a time, and under such circumstances that we ought not to allow the alteration to affect our judgment on this appeal. When the note which he subsequently added to his judgment is read, it appears to me perfectly clear that it amounts to an alteration, and not merely to an explanation, of the judgment as expressed in the note as originally entered. The original entry is "I find that this field had been habitually used by the public as a short cut, though they had no leave, and no doubt the plaintiff was a *trespasser*." He says in the note "On the question of trespass I came to no definite conclusion." This statement appears to me to be inconsistent with the terms of the original entry. I think that the judgment of the county court judge must be read as it originally stood in his note-book, and that neither side is entitled to treat as found in their favour by the county court judge any other fact than those which he appears to have found upon the terms of the judgment as at first entered. The judgment so entered proceeds as follows: "I find as a fact defendant knew the horse had bitten other people." That, no doubt, is the judge's finding, but I do not think it precludes us from looking at the evidence to see what the meaning and effect of it is. The plaintiff's counsel asked us upon that finding of the county court judge to come to the conclusion that this horse was so savage and wild as not to differ for legal purposes from a tiger. All I can say as to that is that I do not think that one can draw such an inference from the finding. The learned judge goes on to say: "I think the defendant was guilty of negligence in putting a horse he knew to be dangerous into a field which he knew was habitually used by the public: the defendant was bound to keep safe a horse he knew to be ferocious:

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he did not do so, and is liable." The finding of negligence, of course, would amount to nothing without any finding of facts from which a duty would arise; and accordingly the learned judge has found the facts from which he conceived the duty to arise: he finds that the public habitually used the field as a short cut, though they had no leave, and that the defendant knew that the horse which he was putting into the field was dangerous, and that the field was habitually used by the public; and then he declares that the defendant was bound to keep safe a horse which he knew to be ferocious, and that, as he had not done so, he was liable. I understand that last statement of the learned judge to be a statement of law as to the duty on the part of the defendant which arose upon the facts which he had previously found. The plaintiff's counsel has invited us to say that, upon the county court judge's findings and the evidence, this case falls within the doctrine laid down in *Fletcher* v. *Rylands* (1), and that the keeping of such a horse must be treated as the keeping of a wild animal, which it was wrongful to keep, and in respect of which the law imposed such an obligation on its owner that an action would lie against him, if it were not kept secure, and did any mischief, quite independently of any negligence on his part, that being the obligation which, according to the doctrine laid down by *Fletcher* v. *Rylands* (1), is imposed in cases which come within the scope of that doctrine. I cannot assent to this view of the case. I do not think it is necessary for me to state in detail the evidence given at the trial. It is sufficient, I think, to have referred to so much of it as was absolutely necessary to make the grounds of the judgment which I am giving clear. I may say, generally, that in my opinion the findings of the county court judge were upon the evidence given in some respects very favourable to the plaintiff, and that I could quite have understood his having arrived at conclusions much less favourable to the plaintiff, if he had done so.

Having said so much, I will now endeavour to express the view of the law on the subject which I take. I do not think that anything would be gained by my going through all the cases which have been cited to us. I propose to state the principles which I

(1) L. R. 1 Ex. 265; 3 H. L. 330.

conceive to be applicable to the present case, and I do not propose to discuss the effect of the cases cited, case by case, as illustrating those principles. In my opinion the greater number of those principles are of a character which no one would dispute. It is their application to the facts of the particular case which causes the difficulty, and not any question as to the existence of the principles themselves, which for the most part every one would acknowledge.

In the first place, nobody denies the proposition which I have already mentioned, that there cannot be negligence in the legal sense unless there is some duty which the defendant has failed to observe, and the existence of a duty cannot be established by a general allegation on the part of the plaintiff that it was the duty of the defendant to do such or such a thing; the plaintiff must state such facts that on proof of that statement the duty in law arises. As I have said, the county court judge has found that the plaintiff was a trespasser. He meant by that, in my opinion, that the plaintiff was not lawfully in the defendant's field when he was injured by the horse. Cases have been alluded to where a plaintiff, though having no permanent right to be on the defendant's premises, yet had a temporary right to be there by reason of leave and licence given by the defendant. I think we must take it that in the present case the county court judge meant to find that the plaintiff had no such leave and licence. Another class of case is that in which the plaintiff was upon the defendant's premises, not by virtue of any grant of a right, but by invitation of the defendant. In those cases the plaintiff is not a trespasser, and there is a duty on the part of the defendant towards him. In such cases a duty exists on the part of the person who invites towards a person who acts on the invitation. That duty does not, according to the authorities, amount to a guarantee by the inviter that the person invited shall suffer no injury while on the premises to which he has been invited to come, but only to a duty to take reasonable care that he shall not be exposed to dangers which are more or less hidden, and not obvious. Cases of that kind have been frequently called "trap" cases. One is familiar with the case where a person has been invited to come into a shop, in which

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there is a trap-door so situated that a person using a reasonable amount of care might not see it, and so might meet with an injury, and such like cases. The present case is not one of that class. It is not a case where there has been an invitation given by the defendant to the plaintiff to come on his land. The utmost that could, in my opinion, be said by way of inference from the judge's findings in this case is that the passage of members of the public over the defendant's field was, not by any invitation or licence given by him, but merely without his making any objection. Of course it is true that, with regard to a private right of way, where a landowner goes on for a long time making no objection to the owner of an adjoining tenement going over his land, he may, after the lapse of the statutory period, be placed in such a position that a jury may be directed that, from such actual user without objection, an easement may have arisen; and, with regard to the case of a public highway, a right may similarly arise in favour of the public, except that in that case it is not necessary to prove user for any specific number of years by the public, but the inference of a dedication may arise from the conduct of the landowner, even where that conduct has only gone on for a small number of years, if the surrounding circumstances justify such an inference. You cannot, however, in such cases, draw the inference that, until sufficient time has elapsed to create a private right of way, or such circumstances have occurred as to justify the inference of a dedication to the public, each act of user which without objection in the meantime takes place is lawful or in virtue of a legal right. Therefore I think we must take it upon the facts that the plaintiff was not lawfully where he was when he met with the injuries of which he complains. He had left the public footpath, and trespassed on the defendant's field to make a short cut, as many other members of the public had done before him, climbing, as I understand, over a fence, and walking over the grass on a more or less defined track to the gate near the station. Under these circumstances we have to consider whether any, and, if so, what, duty arose on the part of the defendant towards the plaintiff, notwithstanding the fact that he was a trespasser, and was in the

defendant's field without leave or licence and without any invitation.

On the assumption that the plaintiff was a trespasser, several cases have been cited which do appear to go some way towards shewing that, where a landowner has allowed other persons habitually to come on his land without objecting to their coming, although those who do come cannot say that they are lawfully there, it may be said that they came by what has been called "permission." I do not like the use of the word "permission" in this connection, for it may bear the meaning of "leave and licence." I prefer to use the word which I think was first used by Gibbs C.J. in *Deane* v. *Clayton* (1), where he said that such persons had been "encouraged" to come by the absence of objection. With reference to those cases, I do not think that, upon the facts and findings in this case, it can fairly be said that those persons who used this field as a short cut were encouraged to do so by the defendant. It is not, in my opinion, really correct to say that people were encouraged to come because the defendant did not choose to exercise his full rights and stop or take proceedings against every one who availed himself of this short cut. It is not a case in which the defendant said nothing about the public having no right to cross the field. Far from that, he did, as the evidence in the case shews, appeal to the police in the matter, and call their attention to the nuisance caused by persons trespassing upon his field, although it is quite true that, when it was put to him that he ought, if he objected, to prosecute individuals who trespassed, he said, in effect, with regard to some of those people that he was unwilling to prosecute because they were customers for his milk, and he feared lest he should lose their custom: and, moreover, he shouted to people that they had no right there. I ask myself, under these circumstances, what is the duty, if any, which is owed in such a case by the person who is said, by neglecting to stop people, to encourage them to come upon his land, and who knows that to a large extent members of the public do come there—what is his duty towards the people who so come and use his land, knowing perfectly well that they have no right to be

(1) 7 Taunt. 489.

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there, but assuming that, as a result of good nature or indolence on the part of the landowner, they will be able to do so without any proceedings being taken against them, and what is the burden which they take upon themselves? In my opinion these people, generally speaking, take upon themselves the risk of what they may find on the land which they know themselves to be wrongfully crossing. I do not say that they take upon themselves the risk of finding a tiger in the field, but they take upon themselves, in my opinion, the risk of any danger there may be in the field, if used in the way in which such a field is ordinarily used. This was a pasture field. In such a field one would reasonably expect to find horses and cows, and may be bulls. It is common knowledge that such animals vary very much in temper, some being of a fiercer temper than others; and it is only reasonable to expect that there may be in such a field a bad tempered horse or bull. Where a person avails himself of the absence of objection on the part of the owner of the land, and is induced to trespass by the non-enforcement of that owner's strict rights, he has no right to quarrel with the condition of the land the user of which is not infrequently unobstructed, because the owner does not come forward to stop him, or take any proceedings against him for the purpose of preventing such user. I think that the people who crossed this pasture field must be held to have taken the risk of what they would find there, and that there is no ground for saying that a person who suffers his field to be trespassed on as the defendant did becomes subject to a duty which debars him from using that field as such fields are ordinarily used, namely, by turning out therein a horse or a bull, although that particular animal may happen to have a bad temper. I do not think that it is necessary for me to go through the cases cited, comparing each case with the present, but I hope I have succeeded in making clear the principles upon which my judgment is based. I wish to say once again that it ought never to be forgotten that in cases of this kind, where one has to answer the question whether a duty arose, of which there was a breach, one cannot rely on any hard and fast line: one must deal with each case upon its circumstances. In my judgment, looking at the findings of the county

court judge, and so much of the evidence as is material thereto, no such duty arose as was alleged by the plaintiff. Possibly, under some circumstances, there might be some such duty in the case of a child, but, in my opinion, there was no such duty in respect of a grown man who elected to trespass and take the chance of what he might find in the field, if used as such fields are used in the ordinary course of things. In conclusion I should like to say, speaking for myself, that, in my view, in order to make the head-note to the report of this case in the court below in the *Law Reports* strictly correct, some words should be added. I do not think that it is right to lay it down as an absolutely general rule that "the fact of the defendant's knowledge that the public habitually trespassed there imposed no duty upon him to take any care for their protection." I think the head-note should run thus: "The fact of the defendant's knowledge that the public habitually trespassed there *under the circumstances* imposed no duty upon him to take care for their protection." For the reasons which I have given I think that this appeal should be dismissed.

BUCKLEY L.J. It is not without grave distrust of my own judgment that I venture, on a point of this kind, to differ from my learned colleagues. I am, however, of opinion that this appeal ought to succeed. The field of authorities over which we have been invited to travel is large. I am not going to attempt, even if I were competent to do so, to elaborate a treatise on what is no doubt a difficult head of law.

I am anxious in the first instance to state within what limits, as I understand it, this question arises. The appeal is from a county court, and the findings of the learned judge of the county court on questions of fact are, of course, binding upon us. The county court judge has found as facts, first, that the field in question, to the knowledge of the defendant, had been habitually used by the public as a short cut, though they had no leave. I am there introducing into the first sentence of his judgment the knowledge on the part of the defendant which will be found stated in a later sentence of the judgment. Then he finds, secondly, that the defendant knew that the horse had bitten

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other persons, and knew it to be dangerous, and that, with such knowledge as above stated, he had turned it out into the field. He further finds this by his judgment as originally delivered: "No doubt the plaintiff was a trespasser." Those words occur in this context: "that the field had been habitually used by the public as a short cut, though they had no leave." The words "no doubt the plaintiff was a trespasser," read with that context, to my mind, mean no more than that the plaintiff was there without leave, and was in that sense a trespasser. The judge had not found that there was a public right of way, and had found that there was no leave. He meant to find, I think, that the plaintiff was a trespasser in the sense that he was not there as of right, but not, if I may so express it, that the plaintiff was there in his own wrong, in the sense that he was there otherwise than as one of the public who had, to the defendant's knowledge, habitually used the field as a short cut. It is said that, after the learned judge had once delivered judgment, he was bound by the language which he had used. Be it so. I think, however, that we ought to read not only that judgment, but also the learned judge's own statement or note of January 1, 1909—not for the purpose of correcting his judgment, but for the purpose of understanding it, which is a totally different purpose. The effect of that note, to my mind, is this. He is there saying that he had formed no opinion as to whether there was a public right of way or not; he refers to certain facts which would tell for or against a public right of way, and says "on the question of trespass I came to no definite conclusion." I think his meaning is that he did not decide whether there was a public right of way or not; that what he meant to find was what he found by the words in his original judgment, which I have interpreted as I understand them, and as I think he meant them.

These being the findings of the learned county court judge, it appears to me that the proposition with which I have to deal is as follows. I may exclude from consideration cases in which there was an intention to injure, such as *Bird* v. *Holbrook* (1); it is not suggested that in this case there was any intention to injure. The class of case with which I have to deal

(1) 4 Bing. 628.

is that in which persons, to the knowledge of the owner, have habitually crossed a field without leave of—and then I myself add, as my conclusion from the evidence—but, substantially, without any objection by, the owner. Such persons I may, perhaps, describe as persons who were not there as of right, but were not there by way of doing any wrong. I read the following from the judgment of Martin B. in *Bolch* v. *Smith* (1): "Permission involves leave and licence, but it gives no *right*. If I avail myself of permission to cross a man's land, I do so by virtue of a licence, not of a right. It is an abuse of language to call it a right: it is an excuse or licence, so that the party cannot be treated as a trespasser." Now there the learned Baron is putting the case of a person who is on another's land with permission, which involves leave and licence, and what he is saying is that, while such a person might in a sense be said to be a trespasser, so far as any right is concerned, inasmuch as he has no right, yet, if he is there by excuse or licence, he cannot be treated as a trespasser. The owner of the land has, by his acquiescence, abrogated his right to say to such a person that he has no business there, that he is a trespasser. I wish also to refer to this passage from the judgment of Wightman J. in *Binks* v. *South Yorkshire Railway and River Dun Co.* (2): "There can be no question that here the public have been permitted without objection to pass over the intermediate space between the road and this dangerous canal: but no *right* in them to pass over it is alleged —they have at most only a mere permission, and those who take that permission must take it with all chances of meeting with accidents." I take the learned county court judge, when he said that the plaintiff was a trespasser, to have meant—at any rate I think his finding does not bind me to anything more—that the man was not there as of right; I cannot say that he was there with leave, because the judge finds that he was there without leave; but I think he has treated the plaintiff as a person who was within the class which he had mentioned, namely, persons who had habitually used this field as a short cut, though they had no right to do so. I might, perhaps, describe the class in another way, in the words of Lord Atkinson in *Cooke* v.

(1) (1862) 7 H. & N. 736, at p. 745. (2) 3 B. & S. 244, at p. 252.

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Midland Great Western Railway of Ireland (1), where he spoke of persons who "are in the habit of frequenting merely as trespassers." They are persons who go there without any right, but who, to the knowledge of the owner, habitually go there.

The question then which I have to investigate in this case is whether to persons of that class the landowner does not owe this duty: that he will not wilfully expose them to something whose evil character he knows, but as to which he omits to caution the persons whom he thus allows to come there. Lord Ellenborough in *Townsend* v. *Wathen* (2) says: "Every man must be taken to contemplate the probable consequences of the act he does." I say that here this owner, who was allowing the public habitually to cross his field, and who has in his evidence assigned as to many of them reasons why he did so, namely, that they were customers of his for milk—implying that he wished to conciliate them—must be taken to have contemplated the probable consequences of his act. What is the law in that position of affairs? I am not able to find any authority exactly in point; the nearest, to my mind, is the great judgment of Willes J. in *Gautret* v. *Egerton*. (3) He there says: "Assuming that these were private docks, the private property of the defendants, and that they permitted persons going to or coming from the docks, whether for their own benefit or that of the defendants, to use the way, the dedication of a permission to use the way must be taken to be in the character of a gift. The principle of law as to gifts is, that the giver is not responsible for damage resulting from the insecurity of the thing, unless he knew its evil character at the time, and omitted to caution the donee. There must be something like fraud on the part of the giver before he can be made answerable." The proposition of law, as I understand it, is that the donee must not look a gift horse in the mouth; if something is given, it must be enjoyed as it is given, and taken with its risks; but subject to this, that, if the giver knows of some evil character in it at the time, and does not warn the donee, he is responsible, although it was a gift. The

(1) [1909] A. C. 229, at p. 239. (2) (1808) 9 East, 277, at p. 280.
(3) L. R. 2 C. P. 371, at p. 375.

learned judge goes on: "No action will lie against a spiteful man, who, seeing another running into a position of danger, merely omits to warn him. To bring the case within the category of actionable negligence, some wrongful act must be shewn, or a breach of some positive duty: otherwise, a man who allows strangers to roam over his property would be held to be answerable for not protecting them against any danger which they might encounter while using the licence. Every man is bound not wilfully to deceive others, or do any act which may place them in danger." From this language it follows that there may be a wrongful act which is not a breach of positive duty. Again I agree that the learned judge was speaking of a licence, but the licence of which he was speaking was that which results from a landowner's allowing strangers to roam over his property; not the case of a person who has actually granted a licence, but one who by his conduct has so allowed strangers to roam over his property as that there arises in him a duty not to do any act which may place them in danger, or at any rate a relation towards them such as that it would be a wrongful act to expose them to danger. That judgment is, I think, an authority for the proposition, which to me appears sound, that a person who habitually allows his land to be used without objection by persons who in law no doubt are trespassers owes them the duty not to place on the land which he so allows them to cross an animal which he knows to be vicious and dangerous without warning them of the danger to which they are exposed. The case of *Brock* v. *Copeland* (1) is one in which Lord Kenyon referred to a previous decision of his own in the following words: "His Lordship added that in a former case, where in an action against a man for keeping a mischievous bull, that had hurt the plaintiff, it having appeared in evidence that the plaintiff was crossing a field of the defendant's where the bull was kept, and where he had received the injury, the defendant's counsel contended that the plaintiff having gone there of his own head, and having received the injury from his own fault, that an action would not lie: but that, it appearing also in evidence that there was a contest concerning a right of way over

(1) 1 Esp. 203, 204.

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this field wherein the bull was kept, and that the defendant had permitted several persons to go over it as an open way, that he had ruled in that case, and the Court of King's Bench had concurred in opinion with him, that, the plaintiff having gone into the field, supposing that he had a right to go there, and the defendant having permitted persons to go there, as over a legal way, that he should not then be allowed to set up in his defence the right of keeping such an animal there as in his own close; but that the action was maintainable." In that case there was a contest concerning a right of way: the right of way was not proved. Here there was evidence of user of this field by the public for thirty-five or forty years, but a right of way was not proved. There the defendant had permitted several persons to go over it as an open way: here the public had habitually used the way for years, and, as to many of them, the defendant declined to interfere, because they were his milk customers. The case referred to by Lord Kenyon is not on all fours with the present case, but it goes, I think, a long way towards establishing the proposition, which I think is the true one, that there arises a duty such as I have mentioned, where the person who owns a close has habitually for a long period of time allowed people to use it. That case was referred to by Gibbs C.J. in *Deane* v. *Clayton* (1), where he uses the word "encouraged" which has been quoted by Vaughan Williams L.J. He there said: "Upon this ground Lord Kenyon, and afterward the Court of King's Bench, held that the action was maintainable; because the defendant had held out to the plaintiff and the rest of the public, that they had a right of passage through his close, and having encouraged them to exercise the right, he must not annoy them in the act of using it." The expression "right of passage" there must be understood, I think, as meaning, not that the defendant held out to the public that they had a "right" in the sense of a legal right, but that they had his permission to pass. The word should, I think, be "permission." Then the learned judge proceeds to state the test upon which Darling J. in this case based his judgment: "The true test, by which to try whether such an action as the present be

(1) 7 Taunt. 489, p. 532.

maintainable or not, is to ask whether the man or animal that suffered had or had not a right to be where he was when he received the hurt." I desire to say that, if the word "right" is there to be understood as meaning legal right, that test is, in my opinion, erroneous. It cannot, I think, be maintained after the decision of the House of Lords in *Cooke* v. *Midland Great Western Railway of Ireland.* (1) In that case the children were not on the turntable because they had a right to be where they were; they had no right to be there. There was a question whether they were there without objection; but that they had a "right" to be there is plainly not the case.

Those are the authorities. I wish, in conclusion, only to say a word about *Cooke* v. *Midland Great Western Railway of Ireland.* (1) Lord Macnaghten there said: "It cannot make very much difference whether the place is dedicated to the use of the public or left open by a careless owner to the invasion of children who make it their playground." That was a case of children; and there may be some difference, although not, I think, a material difference for the present purpose, between adults and children, but I gather from these words that Lord Macnaghten was in that case of opinion that, if a careless landowner leaves open, and, may I add, allows the public habitually to cross his property, that raises a duty in the owner of the property. Then further on he says: "It is proved that in spite of a notice board idly forbidding trespass it was a place of habitual resort for children." Habitual user is thus treated as a relevant fact. Then he proceeds, "Now the company knew, or must be deemed to have known, all the circumstances of the case and what was going on. Yet no precaution was taken to prevent an accident of a sort that might well have been foreseen, and very easily prevented." This must mean that liability may arise from the fact that the landowner knows that he is exposing the persons whom he allows to pass over his ground to danger of which he is aware and they are not. I may add that Lord Loreburn L.C., in giving his opinion, uses similar language, namely, to the effect that the place on which the defendants had a machine dangerous unless protected "was to the

(1) [1909] A. C. 229.

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defendants' knowledge an habitual resort of children." I think that the owner of a field which to the owner's knowledge has been habitually used by the public as a short cut, whether they come there by express leave or not, owes them a duty not to expose them to danger by putting into the field an animal which he knows to be dangerous.

On these grounds I think that the defendant is liable, and the appeal ought to succeed.

KENNEDY L.J. In my opinion this case belongs to a class of cases which are often difficult, and in which it is important to remember, in dealing with previous decisions, that they are cases the decisions in which must always be treated as turning to a great extent upon the particular facts of each case. In the present case the appeal is from the judgment of a Divisional Court, consisting of Darling J. and Pickford J., who reversed the decision of the county court judge and held that the defendant was not liable. For reasons which I feel bound to state somewhat fully, as there is a difference of opinion in the Court, I think that the judgment of the Divisional Court was right upon the facts of this case.

The action was brought by a person who entered a fenced close of the defendant's, and was there hurt by a savage horse. In my opinion, he knew that no passage across the close was intended to be permitted by the defendant. He entered by climbing over a wire fence, and crossed to a gate near a railway station, which was sometimes kept by the railway company locked, and at other times unlocked. The finding of the learned county court judge, which is binding upon us, is that the public did habitually cross this close, but, as he affirmatively finds, without the leave of the defendant; and, moreover, it is an undisputed fact that the defendant at one time, some fifteen years ago, had actually put up a notice board, and he had frequently objected to persons crossing, and had shouted to persons who were doing so, though often without effect. He also had applied to the police to prevent persons from crossing the field, but had refused to prosecute trespassers. I agree with, and do not think it necessary for me to repeat, what my brother Vaughan Williams has said as to the

proper reading of the county court judge's note of his judgment; but I may say that there appears to be no doubt that the question was dealt with in the Court below, as the plaintiff's counsel has admitted, entirely on the basis of the plaintiff's having been a trespasser. Now, if that stood alone, and without qualification, I do not myself think that there could be any question about the law on the subject. The use of the word "trespasser" excludes any action of a lawful nature. That such an action as this could not be maintained by a trespasser seems to be implied in the judgment of Lord Cairns L.C. in *Dublin, Wicklow, and Wexford Ry. Co.* v. *Slattery* (1), where he says: "Some question was raised as to whether the deceased was not a trespasser on the line of railway; but this was not seriously pressed, and there was certainly evidence that, whatever might have been the wording of the notice board, the crossing was used, with the assent of the appellants, by persons in the position of the deceased and his friends. The jury also found that the deceased was lawfully using the line." Prima facie, and taken by itself, the term "trespasser" is, I think, exclusive of any right to claim protection in his trespass; subject, however, to this, that a landowner may not, even as regards trespassers or persons using his land entirely without any sort of leave, tacit or express, lay a trap with the intention of injuring them. To put spring guns, or other dangerous hidden things on land with the intention of injuring trespassers is generally unlawful. But, subject to that exception, I think that the view taken by the Divisional Court was right, and is in accordance with previous authorities, of which the most recent is the case of *Murley* v. *Grove* (2), decided by Mathew and Cave JJ. upon pleadings which neatly raised the point. Where the case is one of a mere trespasser, it is difficult, at any rate, to see what right he can have.

It is suggested that the word "trespasser" may require some qualification; that there may be cases where a person cannot be said to be on land as of right, because the owner might, if he pleased, go up to him and turn him off, or might prevent his entrance; but, although he could be thus excluded, he may, in fact, have gone where he is by the tacit permission or

(1) (1878) 3 App. Cas. 1155, at p. 1163. (2) 46 J. P. 360.

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acquiescence of the landowner; or, even if there has not been anything which could in strictness be called "permission," there may have been something in the nature of the premises coming within the terms "inducement" or "encouragement" to him to come on the land. I agree that in such a case a somewhat different question may arise from that involved in the case of a mere trespasser, and that it is necessary further to consider the present case from that point of view.

Now, with regard to the authorities that have been cited, it seems to me clear that in the well-known judgment of Willes J. in *Gautret* v. *Egerton* (1), which I think ought to be read with his earlier judgment in *Indermaur* v. *Dames* (2), the learned judge was dealing with a class of cases which he most carefully describes as cases in which there has been something in the nature of "permission" or "allowance" or "licence" on the part of the landowner. Here the county court judge has expressly found that the public, of whom this plaintiff was one, had no leave; and he could hardly find otherwise, because there had been frequent objection to their crossing the field on the part of the defendant. I agree with the language of Cockburn C.J. in the case of *Gallagher* v. *Humphery* (3), which was cited to us for a dictum of Crompton J. In the judgment of Cockburn C.J., as reported, there is this statement of law: "It is a different question, however, where evidence of negligence on the part of the person granting permission is superadded. It cannot be held that, having granted permission to use a way subject to existing dangers, he is to be allowed to do something further to endanger the safety of the person so using it." In the present case, the user by the public was undoubtedly against the wish of the owner. What is complained of is his user of his close for the purpose of there confining a horse which the learned county court judge has found to have been to the defendant's knowledge a horse liable to bite mankind, and therefore dangerous. The law as to dangerous animals has been much discussed in this case, but in my humble judgment the law is quite clear that, if an animal, whether a horse, or a dog, or a bull, is known

(1) L. R. 2 C. P. 371, at p. 374. (2) L. R. 1 C. P. 274.
(3) 10 W. R. 664.

to be dangerous to mankind, there is nothing wrongful merely in keeping that animal; but, if damage happens from its not being kept in, the owner is liable. I will not go into the vexed question how far the act of a third person may exonerate the owner, if he can shew that it was through that act that the damage happened, although he himself had taken all reasonable care. I will assume that, if the animal is not kept in, the owner is in law responsible for damage done by it. The law is stated in 1 Hale's Pleas of the Crown, p. 430. But this defendant did not let out a dangerous animal; it was in his fenced close; and, therefore, the only way in which the plaintiff can put his case is that there was a duty on the part of the defendant either so to keep the animal in his close that he could not do damage to a trespasser there, or not to put the animal in his close at all, because there had been something in the nature of permission, licence, or encouragement to the plaintiff to go through that close. Assuming the case to be so put, the point has apparently escaped notice in this case that the element referred to by Cockburn C.J. in his judgment in *Gallagher* v. *Humphery* (1), which contains the most favourable statement of the law for the plaintiff that I can find, is absent, namely, the adding by negligence or otherwise of some danger after permission or licence given to the plaintiff or the public for the use of the way on the part of the owner. As a matter of fact this horse was apparently kept in this close, at times at least, for at least three years before the accident to the plaintiff happened. If I correctly appreciate the evidence here, as far back as 1905 this animal was in the close, and complaints had been made about it. If the horse was there in 1905, I do not think it could be reasonably contended that this is a case in which something had been added by way of a hidden peril to a person crossing the field since the time when such a permission or invitation was given as the plaintiff is entitled to rely upon. It seems to me, however, that the plaintiff, in order to succeed, was bound to shew that he had something in the nature of permission, at any rate by implication, or a licence, though it may be a revocable licence, to go over the field; but in my opinion that was not so. The facts,

(1) 10 W. R. 664.

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as I have said, fall far short of that. In the important passage which Buckley L.J. has cited from *Gautret* v. *Egerton* (1), the case contemplated by Willes J. is one in which a peril has been created where the plaintiff had a right to suppose there would be no such peril. It seems to me that, if I have a horse which is dangerous, and which I am therefore bound to keep in, but which I am keeping in my own close, whether it be a yard or a fenced field, and a person chooses to run the risk of going into that close, whether the horse be there or not, then the mere fact that he has not, as one of the public, been prevented by me from going there when he chose does not entitle him to maintain an action against me on the ground that he has been exposed by me to a hidden danger. It is just as if in such a case there had been a pit dug, not for the purpose of injuring trespassers, but for the reasonable purposes of the owner, in the middle of a field, and a person without leave had taken the risk of going through it at night.

I admit that some of the cases are very far from being easy to reconcile, and it is not easy to draw the line; but I should suggest that the true line is, as seems to be suggested by Mr. Beven in his book on "Negligence in Law," 3rd ed. vol. 1, p. 443, to be drawn between cases in which there has been what may be called "permission," "allowance," or "licence," e.g., absence of objection under circumstances implying intentional encouragement to people to use a way, and cases in which there has been merely tacit acquiescence short of such permission, allowance, or licence. Mr. Beven quotes as an authority on that subject the judgment of Bigelow C.J. in *Sweeney* v. *Old Colony and Newport Railroad Co.* (2) "The true distinction," the Chief Justice says, "is this: a mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability; but, if he directly or by implication induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in a safe condition, suitable for such use, and for a breach of this obligation he is liable in damages to a person injured thereby." Now, viewing the facts here, I do not find any evidence of encouragement on the part of the defendant. It is here found by

(1) L. R. 2 C. P. 371. (2) (1865) 92 Mass. 368.

the county court judge that the public habitually crossed this field without leave. If there had been a finding to the contrary, of course we should have been bound by it. But it is clear on the evidence that there was frequent objection on the part of the defendant, and that a notice against trespassing was actually put up by him, and an application made to the police to prevent trespassing. What more could the defendant, practically, do? It does not seem to me, therefore, that there was any case of even tacit acquiescence here. It is quite true that where you get a "licence" another question arises. The case of *Binks* v. *South Yorkshire Railway and River Dun Co.* (1) is a good example of such a case. Reading the passages which have been referred to from the judgments of Blackburn J. and Wightman J. in that case, it seems to me clear that they were there contemplating a case of actual licence in the sense of permission, not necessarily express, but implied. Wightman J. there says, quoting the language of Williams J. in *Hounsell* v. *Smyth* (2), "'No right is alleged; it is merely stated that the owners allowed all persons who chose to do so, for recreation or for business, to go upon the waste without complaint—that they were not churlish enough to interfere with any person who went there. One who thus uses the waste has no right to complain of an excavation he finds there. He must take the permission with its concomitant conditions, and, it may be, perils.'" That is the view where there is permission. Then he goes on: "There can be no question that here the public have been permitted without objection to pass over the intermediate space between the road and this dangerous canal; but no right in them to pass over it is alleged—they have only a mere permission, and those who take that permission must take it with all chances of meeting with accidents." That is a much larger doctrine than anything the defendant here need invoke. I will assume for the purposes of this case that it is too large, and that, if a landowner does, as contemplated by Willes J. in *Gautret* v. *Egerton* (3), by negligence, or by the omission to perform his legal duty with regard to a dangerous animal, add to the perils of a place to which there is permission to go,

(1) 3 B. & S. 244. (2) (1860) 7 C. B. (N.S.) 731.
(3) L. R. 2 C. P. 371.

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he may be liable. Here there was, in my view, no permission, but at most passive acquiescence, and that only in the sense that the defendant took no active steps, such as taking legal proceedings, or building a wall so high, or making such a fence, that nobody could get into the field. Can it be that, according to our law, because a landowner has not taken legal proceedings, or put up such an erection as would render it physically impossible for persons to get into his fenced field, he is helpless to defend himself from legal liability for any injury which may be occasioned by reason of the fact that, the field being his property, he keeps in it for pasturage there an animal which may from time to time be dangerous to a trespasser, if he crosses the fence, or uses his field in any other way of business which may involve danger to a trespasser? I cannot think that is so. In the case of *Binks* v. *South Yorkshire Railway and River Dun Co.* (1) Blackburn J. at the close of his judgment says: "There may possibly be cases where the owner of land adjoining a way may by his acts induce the public to go near to an excavation in his land, so as to get into danger; in which case it would be the same thing whether the way were a highway or not." There was here, so far as I can see, no inducement, within the language of Blackburn J., given by the defendant to the plaintiff to cross this field; unless, in every case where a man owns land which it may be convenient for other people to go upon, he may be said to encourage everybody to commit a trespass on his land, simply because he does not take legal proceedings against trespassers. I do not see how a man can be said to have induced or encouraged people to come on his land, where he did take such steps, by way of objection and protest, as were proved in the present case.

Reference has naturally been made to the decision in *Cooke* v. *Midland Great Western Railway of Ireland.* (2) That decision is, of course, binding on us, and we must loyally follow it as a decision of the House of Lords; but I think it important to observe that it is, in my opinion, a decision of plainly limited application. It is merely a decision as to whether there was any evidence for the jury of that on which stress is laid in most, if not all, of

(1) 3 B. & S. 244, at p. 254. (2) [1909] A. C. 229.

the judgments in that case, namely, that in the particular case there was an allurement to children. I do not think myself that it is possible to treat cases of this kind relating to children on the same basis as cases of adults. I should like to refer to what Lord Loreburn L.C. said in summing up the effect of the judgments given. He said: "My Lords, I am content to act upon the opinion of my noble and learned friend Lord Macnaghten, having regard to the peculiar circumstances, namely, that this place, on which the defendants had a machine, dangerous unless protected, was to the defendants' knowledge an habitual resort of children, accessible from the high road near thereto, as well as attractive to the youthful mind; and that the defendants took no steps either to prevent the children's presence, or to prevent their playing on the machine, or to lock the machine so as to avoid accidents, though such locking was usual. I must add that I think this case is near the line. The evidence is very weak, though I cannot say there was none. It is the combination of the circumstances to which I have referred which alone enables me to acquiesce in the judgment proposed by my noble and learned friend Lord Macnaghten." It is impossible, I think, to treat this case otherwise than as one depending upon the special circumstances mentioned by the Lord Chancellor, namely, that there was an allurement to children by reason of the condition in which the defendants kept their premises, and the existence thereon of this unprotected machine, and that they knew that such a machine would be likely to allure children. That is a circumstance which seems to me to be wholly wanting here. The only allurement here that any trespasser could plead was that the defendant's field afforded a short cut. It seems to me that there was nothing in this case, which is that of a grown up person, which could give rise to a duty on the part of the defendant to keep his premises in such a condition as that no injury could be occasioned to any one trespassing thereon.

Whether this case is treated as a case of bare trespass, and nothing more, in which case I think the plaintiff is plainly out of Court, or as I prefer to treat it, namely, with reference to the contention that, though the plaintiff had no right to be where he was, yet, the owner not having effectively objected to people

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crossing the field, there might in some sense be said to be a tacit acquiescence on his part in their doing so, I think the plaintiff must fail; for I think myself that mere tacit acquiescence in that sense does not come within the judgment of Willes J. in *Gautret* v. *Egerton* (1), or the other judgments to which we have been referred, as for example that of Cockburn C. J. in *Gallagher* v. *Humphery*. (2) In this case the facts do not appear to me to shew any encouragement, or inducement, or invitation by the defendant to the plaintiff to cross this field, and I think that the cases of this kind in which it has been held that there was a liability on the part of the defendant, when examined, really all shew that the basis of the liability was treated as being something in the nature of permission by the landowner which might be called an encouragement or invitation by him to the plaintiff to come on the land. I admit that the line in such cases is hard to draw, but on the whole I think that the plaintiff has failed to make out a case.

I will only add, in conclusion, that I agree with Pickford J. in the Court below that we cannot give judgment for the plaintiff, unless we are prepared to overrule the decision of Mathew J. and Cave J. in *Murley* v. *Grove* (3), which appears to me to be precisely in point. There the defendant made a dangerous excavation in a place where he knew the public had been in the habit of going, but, as they had no right to go there, those learned judges held that, subject to the duty not to set a trap with the intention of injuring a trespasser, there was no such duty incumbent on the defendant in the case as to render him liable.

For the reasons which I have given I am of opinion that on the findings and facts in the present case no duty has been made out by the plaintiff which will support the action.

Appeal dismissed.

Solicitors for plaintiff: *Blyth, Dutton, Hartley & Blyth, for W. H. Chapman, Whitehaven.*

Solicitors for defendant: *Harrison & Powell, for Brown, Auld & Brown, Whitehaven.*

(1) L. R. 2 C. P. 371. (2) 10 W. R. 664.

(3) 46 J. P. 360.

E. L.

[IN THE COURT OF APPEAL.]

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1909
Dec. 15.

STOREY *v.* TOWN CLERK OF BERMONDSEY.

Parliament—Registration of Voters—Revising Barrister—Rules of Evidence—Admissibility—Hearsay Evidence—Appeal—Parliamentary Registration Act, 1843 (6 & 7 *Vict. c.* 18), *s.* 65.

A revising barrister, before whom evidence is adduced in support of a claim to be on the list of voters, is bound, if objection is taken to that evidence, to decide the question whether it is admissible by reference to the legal rules on the subject of the admissibility of evidence. If he has so decided that question and has, accordingly, admitted or rejected the evidence, as the case may be, then s. 65 of the Parliamentary Registration Act, 1843, prohibits any appeal from his decision ; but that section does not enable him to admit and act on evidence, though objected to, irrespective of the question whether it is admissible or not according to the law of evidence.

APPEAL from the judgment of a Divisional Court (Lord Alverstone C.J., Channell J., and Lord Coleridge J.) upon a case stated by a revising barrister. The case stated was as follows :

1. At a revision court held in September, 1909, by me, the revising barrister for the parliamentary borough of Southwark, Thomas Nunn claimed to have his name inserted in the list of electors for the Rotherhithe Division of the said borough as follows:—

PARISH OF BERMONDSEY.

Polling District 1. Division 1 of Occupiers List.

Name.	Place of Abode.	Nature of Qualification.	Qualifying Property.
Nunn, Thomas	43, Artillery Street	Dwelling House (successive)	26, Curlew Street and 43, Artillery Street

2. At the sitting of the Court W. J. Storey by Mr. A., his agent, handed me a written notice under s. 39 of 6 Vict. c. 18 of his intention to oppose this claim.

3. When the claimant's name was called, Mr. A. stated that the opposition was on the grounds that (1.) the claimant did not

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occupy the premises named in the fourth column during the whole of the qualifying year, and (2.) that he was not the owner or tenant of both or either of them.

4. Mr. A. called and examined a canvasser who had made inquiries on behalf of the objector and had noted down the information he had obtained. The canvasser read out his notes and they were put in.

5. The claimant was not present in person, but appeared by Mr. B., agent, who stated that the claimant had no agreement in writing at either of the premises, and that neither of his landlords was present in Court.

6. I questioned the overseer as to each of the objections. He said the claimant's name was on the current register and that he was not disqualified on account of rates or poor relief, but he, the overseer, had no personal knowledge of the facts relating to the conditions of the claimant's occupation of the houses; but he, the overseer, had made a special inquiry at each of the houses as to the claim after he had received it. The inquiry was made by a man in his employ who visited the houses and, in a book given to him for the purpose, noted down the answers given to him. The book containing the notes was produced by the overseer. His canvasser was called by me and he verified his notes. He was questioned by Mr. A.

7. I then called upon Mr. B. to prove the claim.

8. Mr. A. said he would withdraw the first objection, namely, as to time.

9. Mr. B. admitted that the claimant was not the tenant householder of the whole house at either of the places named, that there was no agreement in writing, and he had no witness who was present when either of the agreements was made; but he proposed to give evidence of statements made to him by the claimant when the claim was filled up, and to put in printed declarations signed by the claimant and the householder tenant of each of the houses mentioned in the fourth column. He also proposed to call his own canvasser, who had made inquiries at each of the houses; and, further, he proposed to call the overseer and the overseer's canvasser, and to put in the books of the overseer.

10. Mr. A. objected to this evidence or any of it being admitted on the ground that it was not direct evidence, and he contended that in the absence of a written agreement no evidence save that of the householder tenant was admissible.

11. I admitted the evidence of Mr. B. and his canvasser, and the printed declarations aforesaid. I also admitted the evidence of the overseer and his canvasser, and I looked at the books. I did not, however, decide, nor was I in any way called upon to decide, that any such items of evidence would be evidence in the strict legal sense in an ordinary Court of law.

12. Mr. A. declined to cross-examine Mr. B. or the overseer, or their canvassers, and offered no further evidence.

13. The following facts were proved to my satisfaction:— Each of the said houses was an ordinary Bermondsey dwelling-house. At each house the claimant occupied the upper floor rooms. He took them unfurnished from the householder by verbal agreement by the week. In making the agreement nothing whatever was said about control.

14. He got the keys of his rooms and a key of the street door. The street door was never fastened, and he and his family went out and came in at all times when they wished day or night. He paid rent to the householder, his immediate landlord, who occupied the lower floor.

15. The claimant was not related in any way to his landlord, and received no services from him or his family.

16. The said landlord never interfered or tried to interfere in any way with the claimant's using of the rooms.

17. If at the time of letting the said landlord had sought to reserve control of the claimant or the rooms, the claimant might or would have gone elsewhere. If the landlord were to stipulate for control of the rooms, he would have some difficulty in letting them.

18. The tenant of each of these houses held it on a weekly agreement from a superior landlord, who paid the rates for the whole house as a single tenement.

19. No. 26, Curlew Street is an old little house in a mean street, in which the residents are of the labouring class. No. 43, Artillery Street is a similar kind of dwelling similarly situated.

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20. The rateable value and letting value of this description of property has fallen about 20 per cent. in the last few years. Many old dwelling-houses in the neighbourhood are empty or have unfurnished rooms to let. No. 26, Curlew Street is now empty and "to be let or the site sold."

21. The claimant would when he entered the premises have no difficulty in obtaining similar accommodation at the same price in either of those streets, or in the same immediate neighbourhood.

22. On this evidence I was of opinion and found as a fact that the landlord had, during the claimant's tenancy, no right of access to the claimant's rooms, and that the claimant occupied the rooms in No. 26, Curlew Street and 43, Artillery Street, not as a lodger, but as a sub-tenant of a separate dwelling-house free from any control by his landlord. In case of annoyance the only civil remedy would be by notice to quit. I therefore allowed the claim.

23. Seventy-seven other claimants, whose names are set out in a schedule hereto, were objected to under similar circumstances, and the party agents—Mr. A. and Mr. B.—agreed that the said seventy-seven other claimants should be bound by the decision in Nunn's case. I therefore consolidated the appeals.

24. If I had had to decide the case on the evidence of the overseer and his canvasser only, I would have decided that the objection had failed.

25. Due notice of appeal was given to me on the ground that the aforesaid evidence of the claimant's agent and his canvasser, and of the overseer and his canvasser, and of the overseer's books, was under the circumstances wrongfully admitted, and that there was no legal evidence on which it was open to me to find that the claimant was entitled in respect of the qualification claimed for. Sect. 65 of 6 Vict. c. 18 was referred to, and I, doubtingly, agreed to state a case.

26. The question for the Court is whether the said evidence was wrongfully admitted.

27. If the Court should decide in the affirmative, the name of Thomas Nunn and the names of the seventy-seven other

claimants should be struck out of the register of electors for the Rotherhithe Division.

The Divisional Court held that, having regard to the provisions of s. 65 of the Parliamentary Registration Act, 1843, they had no power to review the decision of the revising barrister with regard to the admission of evidence.

Foote, K.C., and *Lewis Coward*, K.C. (*Daldy* with them), for the appellant. The effect of s. 65 of the Parliamentary Registration Act, 1843, is not, as will be suggested for the respondent, to enable a revising barrister to disregard the law of evidence altogether and to admit whatever he pleases by way of evidence. What it provides is that, where he has decided that something tendered before him as evidence is or is not admissible, as the case may be, according to the laws of evidence, there shall be no appeal from his decision. Here the revising barrister in paragraph 11 of the case distinctly states that he did not decide whether the evidence objected to was evidence in the strict legal sense in an ordinary Court of law, but, without deciding that question, proceeded to act upon the evidence. The Court below seem to have thought that they were bound by the terms of the question appended to the statement of facts in the case by the revising barrister, and that s. 65 precluded them from entertaining such a question. But it is submitted that the terms of that question did not bind them, and that the Court can decide the question which upon the facts stated in the case really arises. There is nothing in the Parliamentary Registration Acts to indicate that the admissibility of evidence in the revising barrister's Court is to be governed by any other rules than those applicable in any other Court; but there are, on the contrary, provisions from which the inference is that the ordinary rules of evidence apply. Sect. 41 of the Parliamentary Registration Act, 1843, seems to import that the ordinary rules of evidence must apply. It gives the revising barrister power to administer an oath to persons examined before him, and provides that persons so examined on oath shall, if they swear falsely, be guilty of perjury, and that the revising barrister shall "have the same powers and proceed in the same manner (except where otherwise

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directed by this Act) as the returning officer of any county, city or borough, according to the laws and usages observed at elections previous to the passing of the said recited Act." There does not appear to be any authority as to what evidence a returning officer could have received, but there is authority to shew that parliamentary committees on appeal from him were bound by the legal rules as to admissibility of evidence. See *Middlesex Election Petition* (1); Chambers' Dictionary of the Law and Practice of Elections, p. 616.

Sub-s. 10 of s. 28 of the Parliamentary and Municipal Registration Act, 1878, which specially provides that the revising barrister shall receive, as prima facie evidence of an objection, that which would not otherwise be legal evidence, proceeds on the assumption that, in general, the rules of evidence apply to revision courts: see *Kent* v. *Fittall.* (2) The same observations apply to ss. 23 and 24 of the same Act. Sect. 65 of the Parliamentary Registration Act, 1843, provides that there shall be no appeal upon the admissibility of any evidence adduced to establish any matter of fact only. Here the evidence was given upon a question of mixed fact and law, i.e., whether the claimant's status was that of inhabitant householder or lodger. [They also cited *Kemp* v. *Fraser.* (3)]

W. A. Casson, for the respondent. It has been the general practice of revising barristers to receive evidence which would not in the strict legal sense be evidence. It would be practically impossible to complete the revision within the period allowed by statute if the strict laws of evidence were in each case insisted upon; and it is suggested that, the Legislature recognizing this, s. 65 was passed with the intention that no decision of a revising barrister with regard to the admission or non-admission of evidence before him should be questioned by appeal, but that it should be left to his discretion to say upon what materials he would act and what he would accept as evidence. There is really nothing in the Parliamentary Registration Acts to shew that the Legislature meant that only evidence which would be admissible

(1) (1804) 2 Peckwell's Election Cases, cases 8, 9, pp. 139, 140.

(2) [1908] 2 K. B. 933.

(3) (1897) 1 Sm. Reg. Ca. 127, at p. 134.

according to the strict rules of law in a Court of justice should be admitted in a revision court. There are many tribunals constituted under various statutes for the purpose of inquiring into different matters: e.g., inquiries are held by officers appointed by the Local Government Board to inquire into local matters; it has never been held that at such inquiries only evidence in the strict legal sense is admissible. [He cited *Douglas* v. *Smith*. (1)]

Lewis Coward, K.C., for the appellant, in reply.

VAUGHAN WILLIAMS L.J. In my judgment we are not bound, as regards the matters with which we are entitled to deal, by the terms of the question which the revising barrister has appended to his statement of the facts of the case. If I thought that we were so bound, I should agree with the judgment of the Divisional Court, because s. 65 of the Parliamentary Registration Act, 1843, makes it clear that the Court has no power to review the decision of the revising barrister with regard to the admissibility of evidence. That section is as follows: "No appeal or notice of appeal under this Act shall be received or allowed against any decision of any revising barrister upon any question of fact only, or upon the admissibility or effect of any evidence or admission adduced or made in any case to establish any matter of fact only: provided always, that, if the said Court shall be of opinion in any case that the statement of the matter of the appeal is not sufficient to enable them to give judgment in law, it shall be lawful for the said Court to remit the said statement to the revising barrister by whom it shall have been signed, in order that the case may be more fully stated." The Divisional Court appear to have been of opinion that the question which the revising barrister has appended to the case concerned his decision as to admissibility of evidence, and, that being so, s. 65 prevented the Court from having any right to review that decision. I think, however, that, inasmuch as the revising barrister has stated the facts with regard to what happened in his Court, and has told us what he did upon those facts, it is open to us, and it is our duty, notwithstanding the terms of the question which he has appended to the case, to decide whether he was right in taking the course which

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he took upon the facts which are therein stated. It does not appear to me to be necessary to go through the facts so stated at length. I think it will be sufficient to refer to paragraph 11 of the case, which is as follows: "I admitted the evidence of Mr. B. and his canvasser, and the printed declarations aforesaid. I also admitted the evidence of the overseer and his canvasser, and I looked at the books." If the paragraph had stopped there, I might have been disposed to think that the question raised was whether the revising barrister was right or not in deciding that the evidence of Mr. B. and his canvasser was legally admissible; and, if that had been the question, s. 65 of the Act of 1843 would, no doubt, have prevented the Court from having any jurisdiction to entertain it. But the paragraph proceeds as follows: "I did not, however, decide, nor was I in any way called upon to decide, that any such items of evidence would be evidence in the strict legal sense in an ordinary Court of law." I think that statement imports that the revising barrister did not decide in any way whether this evidence was admissible according to the law of England; but what he did was, without troubling himself as to the admissibility of the evidence in point of law, to hold that he was entitled to act and should act upon the statements made before him, whether they were legal evidence or not. If that were right, it would always be open to a revising barrister to say that he would not be troubled with the law of evidence at all; that he should not ask himself the question whether any evidence was legally admissible or not, but should simply say that he would receive it and act upon it; and that, if it was objected that the evidence tendered was mere gossip, he might answer that he chose to act upon gossip. It seems to me impossible for us to give a decision the result of which would be to allow a revising barrister to act in this way. In my opinion he is not entitled so to act, but is bound to apply his mind to the question, if raised, whether statements made before him or documents tendered to him as evidence are or are not admissible as evidence in point of law. It may be the practice of revising barristers very often to listen to statements and to receive documents which are not, strictly speaking, admissible in law as

evidence, where no objection is raised as to their admissibility. There is no statement in the case as to any such practice. The Lord Chief Justice and Channell J., who was himself once a revising barrister, did, it is true, in their judgments in the Court below recognize to some extent the existence of such a practice; but I do not think that their observations on that subject were meant to apply to cases where the admissibility of such evidence was questioned by a person objecting to the claim for a vote. The revising barrister's Court is one in which evidence can be, and frequently is, given on oath; and s. 65, by its terms, itself appears to assume that there is some legal rule or standard as to the admissibility of evidence applicable in that Court. I have no doubt myself that the revising barrister is under an obligation to consider the question of the legal admissibility of evidence when raised. There is only one other matter to which I need allude. The Lord Chief Justice in his judgment refers to sub-s. 10 of s. 28 of the Parliamentary and Municipal Registration Act, 1878, and the special provisions of that sub-section, to which our attention has been called, and by which an objector is allowed to give prima facie evidence of the ground of his objection by means of that which would not, strictly speaking, be admissible evidence in law; and it has furthermore been pointed out that there are other sections in the same Act framed on the basis that the laws of evidence do apply to the revising barrister's Court, and, therefore, in cases where it is desired for some reason to make something admissible in evidence which would not be admissible according to those laws, it is necessary to make special provision by legislation to that effect. In my judgment this appeal must be allowed.

BUCKLEY L.J. I am of the same opinion. The question for decision arises upon the construction of s. 65 of the Parliamentary Registration Act, 1843. In that statute the subject-matter with which the earlier part of s. 65 deals, namely, the decision of the revising barrister with regard to a question of fact and the materials upon which he is entitled to determine the same, is to be contrasted with the subject-matter of s. 42 namely, his decision upon a question of law. Upon the terms

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of s. 65 two propositions appear to be true—first, that, if the revising barrister holds certain evidence tendered before him to be such as would be evidence in the strict legal sense in an ordinary Court of law, and thereupon admits it, there can be no appeal, although it was not in truth such evidence; secondly, that, if the revising barrister holds the evidence not to be such as would be evidence in the strict legal sense in an ordinary Court of law, and thereupon rejects it, there can be no appeal, although it was in truth such evidence. The present case comes within neither of these propositions. Here the revising barrister says that he did not hold either the one way or the other on the question whether the evidence adduced before him was such as would be evidence in the strict legal sense in an ordinary Court of law, but, in effect, that he held that it was admissible before himself, and that he acted upon it, without deciding the question as to its admissibility in the strict legal sense. The question with which he concludes the case is not, I think, the right question. The true question for the Court upon the facts stated in the case appears to me to be whether the evidence in question was evidence which the revising barrister could hold to be admissible before himself without deciding that it was such as would be evidence in the strict legal sense in an ordinary Court of law. Put thus, the question appears to relate to a decision of the revising barrister upon the effect of the Acts with regard to parliamentary registration, which is quite a different matter from a mere decision as to the admissibility in law of certain evidence, such as is contemplated by s. 65 of the Act of 1843. What the case states is substantially this: that certain evidence was tendered by Mr. B. on behalf of the claimant; that this evidence was objected to by Mr. A. on behalf of the objector; and that then the revising barrister proceeded to rule, in effect, that the evidence was admissible before him, whether it was or was not evidence in the strict legal sense of the term. He therefore has taken upon himself to determine, not whether certain evidence tendered before him was legally admissible, but whether he could hold something to be admissible before him irrespective of the question whether it was evidence legally admissible. Thus stated, the question plainly is one with regard to the

effect of the Act of Parliament. I asked the counsel for the respondent whether he could point to any provision in the Parliamentary Registration Act, 1843, indicating an intention that the word "evidence" should, for the purposes of that Act, receive some meaning other than its ordinary legal meaning. He was unable to refer me to any such provision. On the other hand there is much which points the other way. The word "admissibility," which is used in s. 65, itself assumes the existence of some standard or code by which the admissibility of the evidence is to be determined. It is difficult to see how a question of "admissibility" could really arise, if no rule of law applied by which to determine the question whether that which is tendered as evidence is capable of being treated as admissible. There is another matter which shews that "evidence" for the purposes of the Parliamentary Registration Acts, generally speaking, means evidence in the strict legal sense. Turning to sub-s. 10 of s. 28 of the Parliamentary and Municipal Registration Act, 1878, I there find the enactment which was the subject-matter of discussion in *Kent* v. *Fittall* (No. 2) (1), and which provides that the revising barrister shall receive as prima facie proof of the ground of an objection something which would not be legal evidence. This is an affirmative provision that under certain circumstances a revising barrister may receive as evidence that which would not be legal evidence; from which it may be inferred that he could not do so under all circumstances. Similar observations apply to ss. 23 and 24 of the Parliamentary and Municipal Registration Act, 1878. These considerations lead me to the conclusion that, except where otherwise specially provided, "evidence" for the purposes of the Parliamentary Registration Acts means evidence in the legal sense. It is, I agree, for the revising barrister to determine the question as to the legal admissibility of evidence tendered, and, if he determines that question wrongly, there is no appeal from his decision; but I do not think that s. 65 of the Act of 1843 enables him to say that, whether the evidence tendered is or is not admissible in law, it is admissible before him.

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KENNEDY L.J. I agree. I so entirely concur with the judgments which have been already delivered that I propose to say very little. First I wish to say that, in my opinion, the judgments given in the Divisional Court are really in accord with those given in this Court, with the exception that the Divisional Court appear to have thought that the terms of the question appended to the case by the revising barrister precluded them from giving judgment as we have done. I only wish to add a few words upon the effect of s. 65 of the Parliamentary Registration Act, 1843. That section provides that "no appeal or notice of appeal under this Act shall be received or allowed against any decision of any revising barrister . . . . upon the admissibility or effect of any evidence or admission adduced or made in any case to establish any matter of fact only." Therefore the appeal that is not to be allowed is an appeal against the decision of a revising barrister upon the "admissibility" of such evidence. But, in my opinion, the effect of the statements in the special case is that the revising barrister in the present case did not, within the meaning of that section, give any decision upon the admissibility of the evidence adduced before him. He says "I did not, however, decide, nor was I in any way called upon to decide, that any such items of evidence would be evidence in the strict legal sense in an ordinary Court of Law." He therefore, as it seems to me, disclaimed the function of giving a decision on the admissibility of the evidence, and yet the existence of such a decision by him has been held by the Divisional Court to be a barrier shutting out considerations which otherwise would have prevailed with them as they have prevailed with this Court.

Appeal allowed.

Solicitors for appellant: *Bull & Bull.*
Solicitor for respondent: *Town Clerk of Bermondsey.*
Solicitor for claimant Nunn: *F. A. Rudall.*

E. L.

[IN THE COURT OF APPEAL.]

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Solicitor—Retainer to conduct Defence to an Action—Lunacy of Client—Determination of Solicitor's Authority—Steps in Action taken by Solicitor in ignorance of Determination of Authority—Implied Warranty of Existence of Authority—Liability of Solicitor personally to pay Plaintiff's Costs—Practice—Appeal—"Matter of practice and procedure"—Judicature Act, 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-s.* 4.

Where an authority given to an agent has, without his knowledge, been determined by the death or lunacy of the principal, and, subsequently, the agent has, in the belief that he was acting in pursuance thereof, made a contract or transacted some business, with another person, representing that, in so doing, he was acting on behalf of the principal, the agent is liable, as having impliedly warranted the existence of the authority which he assumed to exercise, to that other person, in respect of damage occasioned to him by reason of the non-existence of that authority.

Solicitors were instructed by a client to conduct his defence to an action which was then threatened and was afterwards commenced against him. Before the commencement of the action the client became, and was certified as being, of unsound mind. In ignorance of his unsoundness of mind, and of his having been so certified, the solicitors entered an appearance for him in the action, and delivered a defence, to which the plaintiff replied, and other interlocutory proceedings took place in the action. Subsequently, the action not then having come to trial, the plaintiff's solicitor was informed that the defendant had been certified as being of unsound mind; and an application was made on behalf of the plaintiff at chambers for an order that the appearance and all subsequent proceedings in the action should be struck out, and that the solicitors who had assumed to act for the defendant should be ordered personally to pay the plaintiff's costs of the action up to date, on the ground that they had so acted without authority. The Master made an order that the appearance and subsequent proceedings in the action should be struck out, but refused to make an order for payment of the plaintiff's costs by the solicitors personally, which refusal was on appeal affirmed by the judge at chambers. The plaintiff having appealed to the Court of Appeal:—

Held—(1.) (by Buckley L.J. and Swinfen Eady J.) that the appeal was on a matter of practice and procedure within the meaning of the Judicature Act, 1894, s. 1, sub-s. 4, and, therefore, the appeal lay direct to the Court of Appeal, and not to the Divisional Court;

(2.) (by Vaughan Williams L.J., Buckley L.J., and Swinfen Eady J., Vaughan Williams L.J. doubting), that the solicitors who had taken on

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themselves to act for the defendant in the action had thereby impliedly warranted that they had authority to do so, and therefore were liable personally to pay the plaintiff's costs of the action.

Smout v. *Ilbery*, (1842) 10 M. & W. 1, questioned.

Collen v. *Wright*, (1857) 8 E. & B. 647, followed.

APPEAL from refusal by Sutton J. at chambers to order that solicitors, who had assumed to act for the defendant in an action for libel and slander, should personally pay the plaintiff's costs in the action.

The defendant Toynbee in August, 1908, retained Messrs. Wontner & Sons, the respondents in the appeal, to act as his solicitors in the conduct of his defence to an action which he then expected to be brought against him by the plaintiff, and, on several occasions in September, instructions in the matter were given by him to the respondents. On October 8, 1908, the defendant was certified, and a detention order was made against him, as being a person of unsound mind not so found by inquisition. It appeared that the respondents had at that time been informed that the defendant was suffering from a nervous breakdown, and was in a home and unable to attend to any business, but it was not until April, 1909, that they became aware that he was of unsound mind and that he had been certified as such. On October 26, 1908, the plaintiff brought an action against one Morshead and the defendant for libel and slander. On October 30 the respondents undertook to appear in that action for the defendant, and did, in pursuance of that undertaking, on November 6 enter an appearance for the defendant. The plaintiff, being subsequently advised that the defendant and Morshead were improperly joined as defendants in that action, discontinued that action as against the defendant, and on December 19 commenced a fresh action against him for libel and slander. The respondents on December 21, 1908, undertook to appear for the defendant in this action, and on December 30 entered an appearance accordingly. On February 22, 1909, they delivered a statement of defence in the action, pleading privilege and denying the alleged libel and slander. On February 26, 1909, an order was made in lunacy appointing the defendant's wife receiver of his estate with certain of the powers of a committee

thereof. The plaintiff put in a reply to the defence of the defendant, and other interlocutory proceedings in the action took place. Afterwards, on April 5, 1909, the action not having then come to trial, the respondents, having, as before mentioned, become aware that the defendant had been certified as a person of unsound mind, forthwith communicated that fact to the plaintiff's solicitor. Correspondence ensued between the plaintiff's solicitors and the respondents with regard to the appointment of a guardian ad litem for the defendant, but ultimately none was appointed. Application was subsequently made on behalf of the plaintiff to a Master at chambers for an order that the appearance in the action, and all proceedings subsequent thereto, should be struck out, and that the respondents should personally pay to the plaintiff her costs of the action, on the ground that they had acted for the defendant without authority. The Master made an order that the appearance and subsequent proceedings in the action should be struck out, but refused to make an order that the respondents should personally pay the plaintiff's costs of the action. On appeal to Sutton J. at chambers against that refusal, he affirmed the decision of the Master. The plaintiff appealed to the Court of Appeal.

Nov. 12. *G. A. Scott*, for the respondents, Messrs. Wontner & Sons. There is a preliminary objection to the hearing of this appeal. The application at chambers, as between the plaintiff and Messrs. Wontner & Sons, was not a matter of practice and procedure within the meaning of s. 1, sub-s. 4, of the Judicature Act, 1894, and there is no appeal under that sub-section to the Court of Appeal. Further, any order made upon such an application is a final order, from which there is a right of appeal, and under s. 1, sub-s. 5, the appeal lies to the Divisional Court. *In re Marchant* (1) is a clear authority on both points. The application did not, in the proper meaning of the phrase, arise out of an action; it was in effect an originating summons, tacked on to the summons in the action which asked that the proceedings should be struck out. It was an application to the summary jurisdiction of the Court, and an order made upon such

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an application is a final and not an interlocutory order: *In re Marchant* (1); *Hayden* v. *Cartwright*. (2)

Montague Shearman, K.C. (*Ernest Todd* with him), for the appellant, the plaintiff in the action. The true question is not whether the order is final or interlocutory, but whether it was made in or in connection with an action. It is a good practical working rule that such an application, if made in connection with an action, is a matter of practice and procedure; secus, if it is an independent proceeding wholly unconnected with an action: see Annual Practice for 1910, vol. 2, 655, 656. That is the distinction drawn in *In re Marchant* (1), where the undertaking sought to be enforced against a solicitor was not given in the course of an action. Here the solicitors have brought themselves within the purview of the action by undertaking to accept service of the writ. This application is as much a matter of practice and procedure as a summons to review the taxation of a solicitor's bill of costs, which has been held to be such a matter: *In re Oddy*. (3)

G. A. Scott in reply. Whether this is a matter of practice and procedure or not, it is clear from *Hayden* v. *Cartwright* (2) and *In re Marchant* (1) that this is a final order, from which under s. 1, sub-s. 5, of the Judicature Act, 1894, an appeal must be brought to the Divisional Court and not to the Court of Appeal.

BUCKLEY L.J. I am of opinion that the preliminary objection to this appeal fails. After the issue of the writ in the action Messrs. Wontner & Sons, the defendant's solicitors, undertook to enter, and in due course did enter, an appearance for the defendant. Subsequently the plaintiff applied to Master Wilberforce that the appearance and all the subsequent proceedings in the action should be struck out, and that Messrs. Wontner & Sons should be ordered to pay the plaintiff's costs incurred subsequently to the appearance. The ground of the application was that the defendant was not of sound mind at the time when Messrs. Wontner & Sons undertook to enter an appearance or at the time

(1) [1908] 1 K. B. 998. (2) [1902] W. N. 163.
(3) [1895] 1 Q. B. 392.

when they in fact entered it. The Master confined his order to the earlier part of the application and ordered that the appearance and all subsequent proceedings in the action should be struck out; he made no order on that part of the summons which asked for payment of the plaintiff's costs by Messrs. Wontner & Sons. Upon appeal to the judge at chambers the decision of the Master was affirmed. It results that no order has been made on the second part of the summons. The plaintiff's notice of appeal to this Court asks that the order of the judge may be rescinded, and that Messrs. Wontner & Sons may be ordered to pay personally to the plaintiff all costs of the action against the defendant Toynbee, and also the costs of the proceedings at chambers. In substance the plaintiff, by this appeal, asks us to hold that Messrs. Wontner & Sons are liable for her costs in the action.

A preliminary objection has been taken on behalf of Messrs. Wontner & Sons to the hearing of this appeal on the ground that it does not fall within the provisions of s. 1, sub-s. 4, of the Judicature Act, 1894, which runs thus: "In matters of practice and procedure every appeal from a judge shall be to the Court of Appeal." The contention is that the appeal lies to the Divisional Court and not to the Court of Appeal. The question for our determination is whether this is a matter of practice and procedure within the meaning of the sub-section. The case of *In re Marchant* (1) has been relied on. That case looks like the present until it is seen that the undertaking there given by the solicitor was not given in an action. That application was an application to the jurisdiction which the Court exercises over its own officers, made by an originating summons, which asked that a solicitor should be ordered to pay to the applicant or his solicitor a sum of money alleged to be due under and in pursuance of a written undertaking to indemnify the applicant against any action which might be brought against him. The undertaking had not been given in the course of an action. Reading the judgment in that case, it is plain that a distinction was drawn between a proceeding brought in an action against a person who is not a party to that action and one brought

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under the inherent jurisdiction of the Court against a person to enforce an undertaking given outside any action. In *Watson* v. *Petts* (1), which was the case of an application for a prohibition to restrain a county court from exceeding its jurisdiction, A. L. Smith L.J. said: "The practice and procedure mentioned in the section cover matters of practice and procedure in connection with a cause or matter in the High Court, and not a matter in which a county court judge is sought to be prohibited from exceeding his jurisdiction in his Court." The expression "practice and procedure" is not confined to steps in the action itself, but covers also matters in connection with the action. In the present case the summons is addressed to the solicitors in the action. The application is made against the solicitors to one of the parties to an action, and is in my opinion a matter of practice and procedure in connection with the action. I think, therefore, that the appeal lies to the Court of Appeal and not to the Divisional Court.'

The appeal itself raises a question of very great importance to solicitors, and must be adjourned for argument before a Court of three judges.

SWINFEN EADY J. I agree.

Preliminary objection overruled.

W. J. B.

Nov. 13, 15. *Montague Shearman, K.C.*, and *Ernest Todd*, for the appellant, the plaintiff in the action. The judge at chambers acted on the authority of *Smout* v. *Ilbery* (2) and *Salton* v. *New Beeston Cycle Co.* (3) In so far as *Smout* v. *Ilbery* (2) decided that an agent is only liable for a breach of warranty of authority where he has done something wrongful, the decision has been overruled by *Collen* v. *Wright* (4): see *Halbot* v. *Lens* (5), per Kekewich J. In *Collen* v. *Wright* (4) the principle was clearly laid down that a person who assumes to act as an agent does not merely warrant that he honestly believes

(1) [1899] 1 K. B. 54.
(2) 10 M. & W. 1.
(3) [1900] 1 Ch. 43.
(4) 8 E. & B. 647.
(5) [1901] 1 Ch. 344.

that he has authority to act for a principal, but warrants absolutely that the authority which he professes to have does in fact exist. The principle of *Collen* v. *Wright* (1) was originally applied to cases of contracts, but in *Oliver* v. *Bank of England* (2), in the Court of Appeal, it was pointed out that the principle applied to any case where a person professed to act as agent of another and induced a third person to act on the faith of that representation.

Firbank's Executors v. *Humphreys* (3) is also an instance of the application of the principle of *Collen* v. *Wright* (1) to a case other than one of contract.

[VAUGHAN WILLIAMS L.J. referred to *Merry* v. *Nickalls*. (4)]

Salton v. *New Beeston Cycle Co.* (5), which was also relied on by the judge at chambers, was wrongly decided, because Stirling J. acted on *Smout* v. *Ilbery* (6) without considering how far that decision had been modified or overruled by *Collen* v. *Wright*. (1) The decision is also distinguishable on the facts, for there the solicitor had authority originally to defend the action, but his authority was revoked by the dissolution of the company shortly before the trial. In the present case the solicitor had no authority to act for the defendant when he entered the appearance, for it is not now disputed that the defendant was insane at that time. For the purpose of making the solicitor liable for a breach of warranty of authority it is immaterial to consider whether he had reasonable ground for believing that he had authority to act for the defendant. [They also referred to *Beattie* v. *Lord Ebury*. (7)]

G. A. Scott, for the respondents, Messrs. Wontner & Sons. The cases in which, prior to *Salton* v. *New Beeston Cycle Co.* (5), solicitors have, in the exercise of the disciplinary jurisdiction of the Court, been ordered to pay the opposite party's costs in an action, on the ground that they had acted without authority, appear to have been cases where the solicitors had acted wrongfully as between themselves and their own clients, and where,

(1) 8 E. & B. 647.
(2) [1902] 1 Ch. 610.
(3) (1886) 18 Q. B. D. 54.
(4) (1872) L. R. 7 Ch. 733; (1875) L. R. 7 H. L. 530.
(5) [1900] 1 Ch. 43.
(6) 10 M. & W. 1.
(7) (1872) L. R. 7 Ch. 777; (1874) L. R. 7 H. L. 102.

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therefore, they might, as between themselves and their clients, have been ordered to bear those costs. The basis of the exercise of the disciplinary jurisdiction of the Court in these cases appears to have been that the solicitor had acted wrongfully as against his client in acting without his authority, even though he might have done so bona fide, and without any wrongful or fraudulent intention. There does not appear to have been any case before *Salton* v. *New Beeston Cycle Co.* (1) in which this jurisdiction has been exercised against a solicitor without his having acted in some way wrongfully. There is only a very imperfect analogy between the case of solicitor and client and that of an ordinary agent and his principal, which is the kind of case to which *Collen* v. *Wright* (2) applies. The solicitor retained to defend an action is not like an agent employed to sell goods. He is retained as a legal expert and an officer of the Court, and he is bound to go on taking the necessary steps in the conduct of the defence until he has notice of the revocation or determination of his retainer. His contract is an entire contract, to conduct the defence to the action until it is finished, and to take all the steps necessary for that purpose, and if he fails to do so he is guilty of a breach of contract: see *Underwood, Son & Piper* v. *Lewis.* (3) Under the circumstances of this case the solicitors would have been incurring a most serious responsibility if they had failed to take the steps which they took on behalf of the defendant, and they cannot possibly be said to have acted wrongfully as against him. They had been retained by the client to conduct his defence to the expected action, and fully instructed by him for that purpose, and they were subsequently informed that he was too ill to attend to business. In that state of affairs they only did what was their duty, and did nothing either legally or morally wrong, in taking the steps which they took. The principle which was acted on in *Smout* v. *Ilbery* (4) really was that, where a principal gives an authority which is in the nature of a continuing authority to an agent, and that authority is determined without the agent's knowledge, as for instance by the death of the principal, then, until the agent receives notice of the fact

(1) [1900] 1 Ch. 43.
(2) 8 E. & B. 647.
(3) [1894] 2 Q. B. 306.
(4) 10 M. & W. 1.

that his authority has been so determined, he is not responsible personally to anybody in respect of acts done by him in pursuance of the authority originally given. The principle so laid down in *Smout* v. *Ilbery* (1) has not, it is submitted, really been overruled in any subsequent case. The facts of *Salton* v. *New Beeston Cycle Co.* (2) were to a considerable extent similar to those of the present case. There a solicitor had originally authority to defend an action in the name of a company, but his authority was determined by the dissolution of the company shortly before the trial. The action was tried on the assumption that the company was in existence, and judgment was given for the plaintiff. Neither the solicitor nor the plaintiff knew till after the trial that the company had been dissolved. Upon motion by the plaintiff that the solicitor might be ordered to pay his costs of the action as from the date of the dissolution of the company, Stirling J., applying the principle laid down in *Smout* v. *Ilbery* (1), held that the solicitor, having originally authority to represent the company, was not liable for acting on that authority after it had been revoked by the dissolution of the company, until he knew, or, by the exercise of due diligence, might have known, of the dissolution; but he held that, as, on the day of the trial, the solicitor was informed that the final meeting of the company had been held, he was on that day put on inquiry whether it had been dissolved, and therefore was liable in respect of costs subsequently incurred. It is submitted that the result of the authorities is that the Court ought not in the exercise of their disciplinary jurisdiction to order the solicitors in this case to pay the plaintiff's costs. [He also cited *Newbiggin-by-the-Sea Gas Co.* v. *Armstrong* (3); *Nurse* v. *Durnford* (4); *Fricker* v. *Van Grutten* (5); *Geilinger* v. *Gibbs* (6); *Reynolds* v. *Howell* (7); *Attorney-General* v. *Odell* (8); *Oliver* v. *Bank of England* (9); *Starkey* v. *Bank of England* (10); *Drew* v. *Nunn.* (11)]

(1) 10 M. & W. 1.
(2) [1900] 1 Ch. 43.
(3) (1879) 13 Ch. D. 310.
(4) (1879) 13 Ch. D. 764.
(5) [1896] 2 Ch. 649.
(6) [1897] 1Ch. 479.
(7) (1873) L. R. 8 Q. B. 398.
(8) [1906] 2 Ch. 47.
(9) [1902] 1 Ch. 610.
(10) [1903] A. C. 114.
(11) (1879) 4 Q. B. D. 661, at p. 666.

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E. Todd, for the plaintiff, in reply. The suggestion that the solicitor can only be ordered to pay the costs in such a case as this where he has acted wrongfully is inconsistent with *Fricker* v. *Van Grutten* (1) and *Geilinger* v. *Gibbs*. (2) The judgment of Lord Davey in *Starkey* v. *Bank of England* (3) shews that it is immaterial for the purpose of the application of the law as laid down in *Collen* v. *Wright* (4) whether the supposed agent knew of the defect in his authority or not.

The solicitors in this case were, having regard to the lapse of time which had taken place since they received their instructions, and to the fact that they knew that their client had suffered from a nervous breakdown and was in a home, guilty of negligence in not making inquiries as to the state of his mind before acting on their original instructions.

Cur. adv. vult.

Dec. 21. The following written judgments were delivered:—

BUCKLEY L.J. Vaughan Williams L.J. has asked me to deliver my judgment first.

The interesting and important question in this case is as to the extent to which the principle of *Smout* v. *Ilbery* (5) remains good law after the decision in *Collen* v. *Wright*. (4) In *Smout* v. *Ilbery* (5) Alderson B., in giving the judgment of the Court, dealt with the authorities under three heads: First, the case where the agent made a fraudulent misrepresentation as to his authority with an intention to deceive. In such case the agent is, of course, personally responsible. Secondly, the case where the agent without fraud, but untruly in fact, represented that he had authority when he had none, instancing under this head *Polhill* v. *Walter*. (6) In that case A., having no authority from B. to accept a bill on his behalf, did accept it as by his procuration, bona fide believing that B. would retrospectively approve that which he was doing. In such case again the agent is personally liable, for he induced the other party to enter into a contract on

(1) [1896] 2 Ch. 649.
(2) [1897] 1 Ch. 479.
(3) [1903] A. C. 114, at pp. 118, 119.
(4) 8 E. & B. 647.
(5) 10 M. & W. 1.
(6) (1832) 3 B. & Ad. 114.

a misrepresentation of a fact within his own knowledge. The third class is where the agent bona fide believes that he has, but in fact has not, authority. This third class the learned Baron seems to subdivide into two heads—the first where the agent never had authority, but believed that he had (e.g., when he acted on a forged warrant of attorney which he thought to be genuine), and the second where the agent had in fact full authority originally, but that authority had come to an end without any knowledge, or means of knowledge, on the part of the agent that such was the fact. The latter was the state of facts in *Smout* v. *Ilbery*. (1) I understand *Smout* v. *Ilbery* (1) not to dispute that in the former of these last two cases (that is, where the agent never had authority) he is liable, but to hold that in the latter (namely, where he originally had authority, but that authority has ceased without his having knowledge, or means of knowledge, that it has ceased) he is not liable. The principle is stated in the following words: "If, then, the true principle derivable from the cases is, that there must be some wrong or omission of right on the part of the agent, in order to make him personally liable on a contract made in the name of his principal, it will follow that the agent is not responsible in such a case as the present. And to this conclusion we have come." It seems to me that, if that principle be the true principle, then the former of the last two mentioned cases ought to have been resolved in the same way as the latter. I can see no distinction in principle between the case where the agent never had authority and the case where the agent originally had authority, but that authority has ceased without his knowledge or means of knowledge. In the latter case as much as in the former the proposition, I think, is true that without any mala fides he has at the moment of acting represented that he had an authority which in fact he had not. In my opinion he is then liable on an implied contract that he had authority, whether there was fraud or not. That this is the true principle is, I think, shewn by passages which I will quote from judgments in three which I have selected out of the numerous cases upon this subject. In *Collen* v. *Wright* (2) Willes J. in giving the judgment

(1) 10 M. & W. 1. (2) 8 E. & B. 647.

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of the Court uses the following language: "I am of opinion that a person who induces another to contract with him, as the agent of a third party, by an unqualified assertion of his being authorized to act as such agent, is answerable to the person who so contracts for any damages which he may sustain by reason of the assertion of authority being untrue. . . . . The fact that the professed agent honestly thinks that he has authority affects the moral character of his act; but his moral innocence, so far as the person whom he has induced to contract is concerned, in no way aids such person or alleviates the inconvenience and damage which he sustains. The obligation arising in such a case is well expressed by saying that a person professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract, upon the faith of the professed agent being duly authorized, that the authority which he professes to have does in point of fact exist." This language is equally applicable to each of the two classes of cases to which I have referred. The language is not, in my opinion, consistent with maintaining that which *Smout* v. *Ilbery* (1) had laid down as the true principle, that there must be some wrong or omission of right on the part of the agent in order to make him liable. The question is not as to his honesty or bona fides. His liability arises from an implied undertaking or promise made by him that the authority which he professes to have does in point of fact exist. I can see no difference of principle between the case in which the authority never existed at all and the case in which the authority once existed and has ceased to exist. In *Firbank's Executors* v. *Humphreys* (2) the rule is thus stated by Lord Esher: "The rule to be deduced is that, where a person by asserting that he has the authority of the principal induces another person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it undertook that it was true, and he is liable personally for the damage that has occurred."

(1) 10 M. & W. 1. (2) 18 Q. B. D. 54, at p. 60.

Lastly, Lord Davey in *Starkey* v. *Bank of England* (1), after stating that the rule extends to every transaction of business into which a third party is induced to enter by a representation that the person with whom he is doing business has the authority of some other person, rejects the argument that the rule in *Collen* v. *Wright* (2) does not extend to cases where the supposed agent did not know that he had no authority, and had not the means of finding out; cites Lord Campbell's language in *Lewis* v. *Nicholson* (3), that the agent "is liable, if there was any fraud, in an action for deceit, and, in my opinion, as at present advised, on an implied contract that he had authority, whether there was fraud or not"; and concludes by saying that in his opinion "it is utterly immaterial for the purpose of the application of this branch of the law whether the supposed agent knew of the defect of his authority or not."

The result of these judgments, in my opinion, is that the liability of the person who professes to act as agent arises (*a*) if he has been fraudulent, (*b*) if he has without fraud untruly represented that he had authority when he had not, and (*c*) also where he innocently misrepresents that he has authority where the fact is either (1.) that he never had authority or (2.) that his original authority has ceased by reason of facts of which he has not knowledge or means of knowledge. Such last-mentioned liability arises from the fact that by professing to act as agent he impliedly contracts that he has authority, and it is immaterial whether he knew of the defect of his authority or not.

This implied contract may, of course, be excluded by the facts of the particular case. If, for instance, the agent proved that at the relevant time he told the party with whom he was contracting that he did not know whether the warrant of attorney under which he was acting was genuine or not, and would not warrant its validity, or that his principal was abroad and he did not know whether he was still living, there will have been no representation upon which the implied contract will arise. This may have been the ratio decidendi in *Smout* v. *Ilbery* (4) as expressed in the passage "The continuance of the life of the principal was,

(1) [1903] A. C. 114, at p. 119.
(2) 8 E. & B. 647.
(3) (1852) 18 Q. B. 503.
(4) 10 M. & W. 1.

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under these circumstances, a fact equally within the knowledge of both contracting parties"; and this seems to be the ground upon which Story on Agency, s. 265a, approves the decision. The husband had left England for China in May, 1839, a time in the history of the world when communication was not what it is now, and the Court seems to have decided upon the ground that the butcher who supplied the goods knew that the facts were such that the wife did not, because she could not, take upon herself to affirm that he was alive. If so, there was no implied contract. The principle, as stated in the words I have quoted, may have been meant to be, but is not in words, rested upon that ground, and, if it is to be understood as it seems to have been understood in *Salton* v. *New Beeston Cycle Co.* (1), it is not, I think, consistent with *Collen* v. *Wright.* (2) The true principle as deduced from the authorities I have mentioned rests, I think, not upon wrong or omission of right on the part of the agent, but upon implied contract.

The facts here are that the solicitors originally had authority to act for Mr. Toynbee; that that authority ceased by reason of his unsoundness of mind; that, subsequently, they on October 30, 1908, undertook to appear, and on November 6 appeared, in the first action, and, after that was discontinued, did on December 21 undertake to appear, and did on December 30 enter an appearance, in the second action; and that they subsequently, on February 22, 1909, delivered a defence pleading privilege, and denying the slander, and did not until April 5 inform the plaintiff that, as the fact was, their client had become of unsound mind. During all this time they were putting the plaintiff to costs, and these costs were incurred upon the faith of their representation that they had authority to act for the defendant. They proved no facts addressed to shew that implied contract was excluded.

It has been pressed upon us that a solicitor is an agent of a special kind with an obligation towards his client to continue to take on his behalf all proper steps in the action. The particular nature of his agency is not, I think, very material. On the other hand it must be borne in mind that after August 21, when the

(1) [1900] 1 Ch. 43. (2) 8 E. & B. 647.

defendant Toynbee wrote to the plaintiff's solicitors, referring them to Messrs. Wontner & Sons, the plaintiff could not consistently with professional etiquette communicate personally with the defendant. During the period from August, 1908, to April, 1909, the solicitors had the means of knowing and did not in fact ascertain that the defendant had become of unsound mind. In the interval they did acts which amounted to representations on their part that they were continuing to stand in a position in which they were competent to bind the defendant. This was not the case. They are liable, in my judgment, upon an implied warranty or contract that they had an authority which they had not.

For these reasons I think that the appellant is entitled to succeed and to have an order against the solicitors for damages, and the measure of damage is, no doubt, the amount of the plaintiff's costs thrown away in the action. The appeal, therefore, should be allowed with costs here and below.

SWINFEN EADY J. The plaintiff on October 26 last applied to the Master that the appearance and all subsequent proceedings in the action might be struck out, and that Messrs. Wontner & Sons, the solicitors for the defendant, might be ordered to pay the plaintiff's costs of the action down to date. The application was supported by an affidavit made by a clerk to the plaintiff's solicitors, from which it appears that the writ was issued on December 19, 1908, and that Messrs. Wontner & Sons undertook to appear for the defendant, and duly entered an appearance on December 30. Paragraph 5 of that affidavit is as follows: "On April 5, 1909, Messrs. Wontner called on me, and informed me that the said defendant, Harry Valpy Toynbee, had been certified, and was then lawfully detained, as a person of unsound mind not so found by inquisition, and I have since ascertained that he was so certified and detained on October 8, 1908 (that is before the writ in either action was issued), and that on February 26, 1909, an order was made in lunacy appointing his wife Sarah Edith Toynbee receiver of his estate with certain of the powers of a committee thereof. Until Messrs. Wontner & Sons so informed me of Mr. Toynbee's condition on April 5,

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1909, I was unaware that he was of unsound mind, although they had more than once told me that he was in poor health and was unable to attend to business matters." The Master made an order as asked, except that he refused to order Messrs. Wontner to pay the costs of the action. The plaintiff appealed to the judge against this refusal, and the judge affirmed the Master. The plaintiff now appeals to this Court, and asks for an order that Messrs. Wontner may be ordered to pay the costs of the action down to date.

No suggestion is made that Messrs. Wontner & Sons were aware of the unsoundness of mind of the defendant before April 5, 1909, nor is their good faith in any way impugned.

The plaintiff contended that, by giving an undertaking to appear for the defendant and by entering an appearance, Messrs. Wontner & Sons represented that they had authority to act as defendant's solicitors, whereas by reason of defendant's unsoundness of mind, occurring at a date antecedent to the action, they had not in fact any authority from him to enter an appearance on his behalf, or to give any undertaking to appear, and are therefore liable for their unauthorized acts. Messrs. Wontner & Sons contended that in August, 1908, when the defendant was of sound mind, they received authority to represent the defendant, and did represent him, in respect of the matters to which the action relates, and that they were not aware and by due diligence could not have ascertained that their authority had determined, and they rely upon the cases of *Smout* v. *Ilbery* (1) and *Salton* v. *New Beeston Cycle Co.* (2) as determining that under such circumstances they are not under any liability for the costs incurred by the other side.

In my opinion the material date to consider is December 30, 1908, when appearance was entered. That was the date upon which Messrs. Wontner & Sons represented that they had authority to defend the action on behalf of the defendant, upon which representation the plaintiff has acted to her prejudice by continuing the legal proceedings which have so far proved abortive. On this view the respondents are not protected by the principle of *Smout* v. *Ilbery* (1), and they are simply in the

(1) 10 M. & W. 1. (2) [1900] 1 Ch. 43.

position of having acted in good faith, but without authority. Under such circumstances good faith alone will not protect them, and they are liable to pay the costs of the party misled: *Newbiggin-by-the-Sea Gas Co.* v. *Armstrong* (1); see also *Fricker* v. *Van Grutten.* (2)

If, however, contrary to my opinion, the true view is that the time with reference to which the point is to be decided whether the solicitors had originally authority to defend the action is August, 1908, when they were instructed to act for defendant, then it becomes necessary to consider what is the result of their continuing to act upon an authority which they once had, but which has determined without their knowledge.

Where an agent represents that he has authority to do a particular act, and he has not such authority, and another person is misled to his prejudice, the ground upon which the agent is held liable in damages is that there is an implied contract or warranty that he had the authority which he professed to have. It would seem to follow from this, in principle, that, where the authority upon which an agent is professing to act is a continuing authority, there is a continuing representation by him that he has authority to do the series of acts, and an implied contract or warranty that he possesses such authority In *Firbank's Executors* v. *Humphreys* (3) the law is thus stated by Lord Esher: "The principle of *Collen* v. *Wright* (4) extends further than the case of one person inducing another to enter into a contract. The rule to be deduced is, that where a person by asserting that he has the authority of the principal induces another person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it undertook that it was true, and he is liable personally for the damage that has occurred." And Lindley L.J. said (5): "Speaking generally an action for damages will not lie against a person who honestly makes a misrepresentation which

(1) 13 Ch. D. 310.
(2) [1896] 2 Ch. 649.
(3) 18 Q. B. D. 54, at p. 60.
(4) 8 E. & B. 647.
(5) 18 Q. B. D. 54, at p. 62.

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misleads another. But to this general rule there is at least one well established exception, namely, where an agent assumes an authority which he does not possess, and induces another to deal with him upon the faith that he has the authority which he assumes."

Now this principle is, in my judgment, equally applicable whether the authority which the agent assumes extends to one act only, or to a series of acts; and, in the latter case, if some only of the acts are unauthorized by reason of an authority having determined, there is no reason why the principle should not extend to those. The fact that the earlier acts of the series were within the authority should make no difference as regards the later unauthorized acts.

The contention of the respondents is inconsistent with the opinion expressed by Lord Davey in the House of Lords in *Starkey* v. *Bank of England*. (1) Lord Davey said: "The whole stress of his" (Mr. Upjohn's) "argument has been to shew that this case is not an exception from the rule as to actions of deceit, and that the rule as laid down in *Collen* v. *Wright* (2), and other cases which need not be enumerated, does not extend to cases where the supposed agent did not know that he had no authority and had not the means of finding out. . . . . I am of opinion that it is utterly immaterial for the purpose of the application of this branch of the law whether the supposed agent knew of the defect of his authority or not, and indeed that is the very doctrine which is asserted by Story J. in the first edition as well as in subsequent editions of his work on Agency to which a reference has been made." And Lord Lindley stated that the decision in *Firbank's Executors* v. *Humphreys* (3) was sound, thus repeating in the House of Lords what he had previously said in that case in the Court of Appeal, to which I have already referred. Lord Halsbury expressed the same view, citing with approval some of the original judgments in *Collen* v. *Wright* (4), which were affirmed in the Exchequer Chamber, laying down that, when a person purports to act as agent, he promises or warrants that he is what he represents himself to be, and can be sued on the

(1) [1903] A. C. 114, at p. 119.
(2) 8 E. & B. 647.
(3) 18 Q. B. D. 54.
(4) 7 E. & B. 301; 8 E. & B. 647.

promise or warranty, although he believed it to be true. Lord Halsbury also points out that this principle is unaffected by the decision in *Derry* v. *Peek*. (1)

Having regard to the authorities to which I have referred, I am of opinion that the distinction acted upon by Stirling J. in *Salton* v. *New Beeston Cycle Co.* (2) is not a sound one,—namely, the distinction between the period before and that after the date at which the solicitor knew, or by the exercise of due diligence might have known, of the revocation of his authority,—the principle that there must be some wrong or omission of right on the part of an agent, for the time being acting without authority, to make him personally liable.

In my judgment *Smout* v. *Ilbery* (3) can no longer be regarded as law, if and so far as it decided that an agent continuing to act without knowledge of the revocation of his authority is not under liability to the other party for his warranty or representation of authority.

I wish to add that in the conduct of litigation the Court places much reliance upon solicitors, who are its officers; it issues writs at their instance, and accepts appearances for defendants which they enter, as a matter of course, and without questioning their authority; the other parties to the litigation also act upon the same footing, without questioning or investigating the authority of the solicitor on the opposite side; and much confusion and uncertainty would be introduced if a solicitor were not to be under any liability to the opposite party for continuing to act without authority in cases where he originally possessed one. At one time the Common Law Courts acted very firmly upon the view that, if an attorney took upon himself to sue or defend, the Courts would presume his authority and not inquire into it; so much so that, if an attorney (being a solvent person) without authority instituted or defended proceedings, the Court would not interfere, but left the party injured to his remedy in damages against the attorney. In an anonymous case, in Salkeld (4), Holt C.J. said: "The course of this Court is, where an attorney takes upon him to appear, the Court looks no farther,

(1) (1889) 14 App. Cas. 337.
(2) [1900] 1 Ch. 43.
(3) 10 M. & W. 1.
(4) Anon., 1 Salk. 86.

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but proceeds as if the attorney had sufficient authority, and leaves the party to his action against him." See also *Stanhope* v. *Eavery* (1); *Bayley* v. *Buckland.* (2) Subsequently, and in consequence of Lord Mansfield's decision in *Robson* v. *Eaton* (3), the Common Law Courts took a different view, and stayed the unauthorized action, and made the attorney pay the costs: *Hubbart* v. *Phillips* (4); *Reynolds* v. *Howell.* (5) The manner in which business is ordinarily conducted requires that each party should be able to rely upon the solicitor of the other party having obtained a proper authority before assuming to act. It is always open to a solicitor to communicate as best he can with his own client, and obtain from time to time such authority and instructions as may be necessary. But the solicitor on the other side does not communicate with his opponent's client, and, speaking generally, it is not proper for him to do so, as was pointed out by Kekewich J. in *In re Margetson & Jones.* (6) It is in my opinion essential to the proper conduct of legal business that a solicitor should be held to warrant the authority which he claims of representing the client; if it were not so, no one would be safe in assuming that his opponent's solicitor was duly authorized in what he said or did, and it would be impossible to conduct legal business upon the footing now existing; and, whatever the legal liability may be, the Court, in exercising the authority which it possesses over its own officers, ought to proceed upon the footing that a solicitor assuming to act, in an action, for one of the parties to the action warrants his authority.

In my opinion an order ought now to be made in accordance with the notice of appeal.

VAUGHAN WILLIAMS L.J. Reluctantly, and not without doubt, I have yielded to the views expressed by my brethren. I concur, and have come to the conclusion that we must reverse the decision of Sutton J., dismissing the plaintiff's appeal against the decision of Master Wilberforce, refusing to order Messrs.

(1) (1836) 5 Dowl. 357; 3 Bing. N C. 301.
(2) (1847) 1 Ex. 1.
(3) (1785) 1 T. R. 62.
(4) (1845) 13 M. & W. 702.
(5) L. R. 8 Q. B. 398.
(6) [1897] 2 Ch. 318.

Wontner & Sons to pay all costs of the action against the defendant Toynbee, and must allow this appeal.

In the present case before us there was on the argument of the appeal no dispute as to the facts. It was agreed that, whether one regards the first writ or the second writ, there were in themselves sufficient general instructions to justify the appearance to both writs, but it is said that the lunacy of the defendant put an end to the instructions.

If the authority was determined by the lunacy, I fear that as to all subsequent costs we must hold the solicitors, however innocent of knowledge, liable. It is, I believe, an extension of the law to hold that a solicitor is responsible where he had authority originally, but the authority is determined by lunacy or death without the solicitor's knowledge. I do not think it necessary to hold that *Smout* v. *Ilbery* (1) has been overruled by *Collen* v. *Wright* (2), for I think that the judgment of Alderson B. is overridden by the words at the end of his judgment shewing that the judgment is based on the relations in law of husband and wife existing at the date when the decision was given.

I have only to add that, if there had been a contest as to facts before us, as there seems to have been at chambers, I should have thought it a better course to leave the plaintiff to her action rather than dispose of the matter on a summary disciplinary order.

The judgment is that the appeal be allowed with costs here and below.

Appeal allowed.

Solicitors for appellant: *Wood, Bigg & Nash, for J. H. Yonge, Worcester.*

Solicitors for respondents: *Wontner & Sons.*

(1) 10 M. & W. 1. (2) 8 E. & B. 647.

E. L.

C. A.
1909
Dec. 3.

[IN THE COURT OF APPEAL.]

THE RIGHT HON. JOHN ALLEN, BARON LLANGATTOCK *v.* WATNEY, COMBE, REID & CO., LIMITED.

Licensing Acts—Compensation—Charge on Renewed Licences—Deduction from Rent — Unexpired Term — Reversionary Lease—Licensing Act, 1904 (4 *Edw.* 7, *c.* 23), *s.* 3, *sub-s.* 3; *Sched. II.*

By s. 3, sub-s. 1, of the Licensing Act, 1904, quarter sessions are directed, when necessary, to impose in respect of all existing on licences renewed in respect of premises within their area certain compensation charges. By sub-s. 3 such deductions from rent as are set out in Sched. II. to the Act may be made by any licence-holder who pays a charge under the section, and also by any person from whose rent a deduction is made in respect of the payment of such a charge. By Sched. II. "a person whose unexpired term does not exceed" one year may deduct 100 per cent. of the charge, and the percentage to be deducted is diminished from time to time according to the scale therein contained until it is reduced to 1 per cent. where the unexpired term does not exceed sixty years, but subject to a proviso that the amount deducted shall in no case exceed half the rent.

The defendants were lessees of a public-house under a lease which expired at Christmas, 1909; they were also grantees of a lease of the same public-house for a term commencing from the day but one next after the date of the expiration or sooner determination of the aforesaid lease and enduring until Midsummer, 1935. Quarter sessions having imposed a charge in respect of the public-house under s. 3, sub-s. 1:—

Held, that the unexpired term did not include the defendants' interest in the reversionary lease, which was a mere interesse termini; and therefore the defendants were persons whose unexpired term did not exceed two years and were entitled to make deductions on that basis.

Decision of A. T. Lawrence J., [1909] 2 K. B. 884, reversed.

Appeal from a decision of A. T. Lawrence J. (1)

The action was brought for payment of the sum of 16*l.* 18*s.* as due to the plaintiff from the defendants for one quarter's rent of the Queen public-house, Camberwell, due December 25, 1908, after deducting income tax under Sched. A and the proportion of the compensation charge payable under the Licensing Act, 1904; and the sum of 20*l.* 19*s.* for one quarter's rent of the Roebuck public-house, Walworth, due December 25, 1908, after deducting income tax and the proportion of the said compensation charge.

(1) [1909] 2 K. B. 884.

The parties concurred in stating the questions of law arising therein in the following case for the opinion of the Court:—

1. The plaintiff is the tenant for life and entitled to receive the rents of two fully-licensed public-houses known respectively as the Queen, Camberwell, and the Roebuck, Walworth, both in the county of London, and the defendants are lessees (or assignees of leases) thereof under the indentures hereinafter mentioned, which indentures are deemed to form part of the case.

2. The action is brought to recover the sum of 16*l.* 18*s.* alleged to be due to the plaintiff in respect of one quarter's rent of the said Queen public-house on December 25, 1908, and the further sum of 20*l.* 19*s.* alleged to be due to the plaintiff at the same date in respect of one quarter's rent of the said Roebuck public-house.

3. By an indenture of lease dated January 23, 1880, and made between the plaintiff of the one part and James Watney of the other part, the said Queen public-house was demised to the said James Watney at the yearly rent of 80*l.*, payable quarterly, for the term of thirty-one years from December 25, 1878, expiring on December 25, 1909. The said lease is now vested in the defendants by assignment dated January 14, 1899.

4. By an indenture dated August 2, 1895, and made between the plaintiff and John Maclean Rolls (hereinafter called the lessors) of the one part and Watney & Co., Limited, of the other part, the lessors, in consideration of the sum of 900*l.* then paid to the lessors, granted to the said Watney & Co., Limited, a reversionary lease of the said Queen public-house at the yearly rent of 80*l.* for a term of years commencing from the day but one next after the date of the expiration or sooner determination of the said indenture of lease of January 23, 1880, and enduring until June 24, 1935. The said reversionary lease is now vested in the defendants by assignment dated July 12, 1899.

5. By an indenture of lease dated August 18, 1887, and made between the plaintiff of the one part and Robart Henchley of the other part, the said Roebuck public-house was demised to the said Robart Henchley at the yearly rent of 100*l.*, payable quarterly, for the term of thirty-one years from December 25, 1886, expiring on December 25, 1917. The said lease is now vested in the defendants by assignment dated January 14, 1899.

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6. By an indenture dated August 2, 1895, and made between the plaintiff and John Maclean Rolls of the one part and Watney & Co., Limited, of the other part, the plaintiff and the said John Maclean Rolls, in consideration of the sum of 500*l.* then paid to them, granted to the said Watney & Co., Limited, a reversionary lease of the said Roebuck public-house at the yearly rent of 100*l.* for a term of years commencing from the day but one next after the date of the expiration or sooner determination of the said indenture of lease dated August 18, 1887, and enduring until June 24, 1935. The said reversionary lease is now vested in the defendants by assignment dated January 14, 1899.

7. The said Queen and Roebuck public-houses respectively were in the year 1908 and at all material times occupied by tenants of the defendants, which tenants respectively were the holders of the licences granted in respect of the said public-houses respectively.

8. The Licensing Act, 1904, by s. 3, empowers the quarter sessions to impose certain charges (hereinafter called "compensation charges") upon all existing on licences renewed in respect of premises within their area, and by sub-s. 3 of the said section such deductions from rent as are set out in the Second Schedule to the said Act may be made by any licence-holder who pays a charge under the said section, and also by any person from whose rent a deduction is made in respect of the payment of such a charge. By the scale of deductions contained in the said Second Schedule to the said Act so far as is material to this case it is provided as follows: "A person whose unexpired term does not exceed one year may deduct a sum equal to 100 per cent. of the charge; a person whose unexpired term does not exceed two years may deduct a sum equal to 88 per cent. of the charge; a person whose unexpired term does not exceed three years may deduct a sum equal to 82 per cent. of the charge; . . . . a person whose unexpired term does not exceed ten years may deduct a sum equal to 45 per cent. of the charge; . . . . a person whose unexpired term exceeds twenty-five but does not exceed thirty years may deduct a sum equal to 7 per cent. of the charge."

9. In the year 1908 the quarter sessions for the county of

London, comprising the licensing division of Newington, in which division the two public-houses are situate, under and by virtue of s. 3 of the Licensing Act, 1904, imposed in respect of the said Queen public-house a compensation charge of 30*l.* and imposed in respect of the said Roebuck public-house a compensation charge of 40*l.* The said compensation charges were in or about the month of October, 1908, duly paid by the licence-holders of the said public-houses respectively, and the said licence-holders made such deductions from their respective rents paid by them to the defendants and payable on December 25, 1908, as are authorized by s. 3 and the Second Schedule of the said Act.

10. The plaintiff admits that the defendants are entitled to deduct from the rents due from them to the plaintiff on December 25, 1908, certain percentages of the said compensation charges imposed upon the said public-houses respectively, but contends that under the scale contained in the Second Schedule to the Licensing Act, 1904, the defendants are entitled to deduct 7 per cent. of the said charges and no more on the ground that they are persons "whose unexpired term exceeds twenty-five but does not exceed thirty years" within the meaning of the said schedule.

11. The defendants contend (1.) that in respect of the said Queen public-house they are entitled to deduct from the rent due to the plaintiff as aforesaid 88 per cent. of the said compensation charge of 30*l.* on the ground that they are persons "whose unexpired term does not exceed two years" within the meaning of the said schedule; and (2.) that in respect of the said Roebuck public-house they are entitled to deduct from the rent due to the plaintiff as aforesaid 45 per cent. of the said compensation charge of 40*l.* on the ground that they are persons "whose unexpired term does not exceed ten years" within the meaning of the said schedule.

[Paragraphs 12, 13, and 14 had reference to the sums payable according to the respective contentions of the plaintiff and defendants.]

15. The question for the opinion of the Court is whether on the facts hereinbefore stated the plaintiff's contention set out

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in paragraph 10 or the defendants' contentions set out in paragraph 11 hereof are correct in law.

A. T. Lawrence J. held that the plaintiff's contention was correct, and gave judgment for the plaintiff.

The defendants appealed.

Acland, K.C., and *Bruce Williamson*, for the appellants. The judgment of A. T. Lawrence J. is based on the idea of doing fanciful justice without considering the language of the Act. The deduction authorized by s. 3, sub-s. 3, is to be made only from rent, and to find out what the rent is you must look at the instrument under which the tenant is in occupation at the time. In the Second Schedule, which provides the scale of deductions, "term" and "rent" are used correlatively. "Term" is a word of art, and the only safe course is to construe it according to its ordinary legal construction. The tenant does not pay rent upon the reversionary term, and in fact that is not in a legal sense a term at all, but is merely an interesse termini. The Act does not say that the burden and the benefit are to go together, and as a matter of fact many persons are entitled to compensation who have never made any contribution to the compensation fund. The construction adopted by the learned judge would lead to all sorts of anomalies. The rent payable under the reversionary lease might have been different, and the interval of time might have been greater; or again, the reversionary lessee might assign to a trustee and take a sub-lease from him. These illustrations are sufficient to shew the difficulties in the way of construing the word "term" in any other than its legal sense.

Macmorran, K.C., and *Ryde*, for the respondent. Here there is the same landlord, the same tenant, and the same rent, and in substance this is simply a renewal of the lease with an interval of a day for conveyancing purposes only; in substance the tenant has an interest in the licensed premises until the end of the reversionary lease. The intention of the Legislature was that the compensation charge should be borne by the persons interested in the licence, and, speaking broadly, the scheme of the Act was that the burden and the benefit should

follow one another: *London County Council* v. *Watney, Combe & Co.* (1) Looking at the scope of the Act, the word "term" is not here used as a term of art and ought not to be construed with the same strictness as if it appeared in some Conveyancing Act. *Reg.* v. *Vestry of St. Marylebone* (2) is in point.

Acland, K.C., in reply. *Reg.* v. *Vestry of St. Marylebone* (2) is a decision under a statute framed in different language and for a different purpose, and it throws no light upon the meaning of the word "term."

In *London County Council* v. *Watney, Combe & Co.* (1) Walton J. said that the Court must look not merely at the general intention of the Legislature, but at the actual language of the Act and schedule.

COZENS-HARDY M.R. This is an appeal from the judgment of A. T. Lawrence J. upon a special case raising a question as to the construction of the Licensing Act, 1904. To my mind the point is not free from difficulty, but as the result of the arguments which I have listened to I have come to a clear conclusion that the learned judge's decision cannot be supported. The scheme of the Act is first of all to impose what is called a compensation levy upon licensed houses; it provides a fund by means of this compensation levy, and it contains a separate provision as to the mode in which the compensation fund is to be distributed and as to the persons who are to share in the fund. But I am quite unable to find within the four corners of this Act any such general intent as to justify the Court in saying that every person who would, if these particular houses, the Queen and the Roebuck, had their licences withdrawn, have been interested in the premises and entitled to share in the compensation fund is therefore bound to share the burden of the compensation levy so long as the house is not taken. I cannot find that at all. The phrase "person interested in the licensed premises" you find repeatedly in ss. 1 and 2, which deal with the distribution and the division of the compensation fund. You do not find those words in s. 3, which provides the source, and the only source, of the compensation levy. It is exacted first

(1) [1909] 1 K. B. 637. (2) (1887) 20 Q. B. D. 415.

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from the occupying tenant, and it is to be paid with the Excise licence; then you find in s. 3, sub-s. 3, a supplemental provision that "such deductions from rent as are set out in the Second Schedule to this Act may, notwithstanding any agreement to the contrary, be made by any licence-holder who pays a charge under this section, and also by any person from whose rent a deduction is made in respect of the payment of such a charge." The question here is what deductions ought to be made, or can properly be made, under these circumstances. The defendants are admittedly the lessees for a short term from the plaintiff; they are admittedly also holders of what I will describe, in language which is perfectly common and in many respects is not inaccurate, as a reversionary lease, which commences after an interval of one day from the termination of the first lease; and the question before us for consideration is this: Ought the defendants to be considered simply as lessees for the residue of the lease under which they are now in possession, of which only a few years have to run, or ought they to be considered, for the purposes of this Act, as holding the property for a term of years composed of the residue of the term of the original lease plus the full term of the reversionary lease? That is the real question between the parties. Now I turn to the Second Schedule, and I observe that there is no context and nothing to explain it. This is called "Scale of Deductions" and is that which is referred to in sub-s. 3 of s. 3. "A person whose unexpired term does not exceed 1 year may deduct" the whole; and then it goes down from year to year until you get to sixty years—after sixty years there is no deduction—with this qualification, that the amount deducted shall in no case exceed half the rent. Now, there being no context, and there being, in my view, nothing to justify us in saying that there is any overriding general intent, I desire for myself to adopt what Walton J. said in the case of *London County Council* v. *Watney, Combe & Co.* (1): "We have not only to look at the general intention of the Legislature, but at the actual words of the Act and schedule, which shew precisely how the Legislature has prescribed that its intention shall be carried out." Now how can we say that the

(1) [1909] 1 K. B. 637, at p. 642.

defendants have a lease for the aggregate of those two terms? Of course in law they have not. I do not lay any great stress upon the intervening period of a day, which is called a mere conveyancing term, though that alone is not to be wholly disregarded, but the second reversionary lease is nothing more than an interesse termini. If the first lease were forfeited the freeholder would re-enter; the second reversionary term would not have become an interest in possession until at the proper time it was perfected by entry; and when you observe that the only mode in which a deduction can be made, or, to use another word, a recoupment can be effected, by an occupying tenant is by deduction from the rent payable by the occupying tenant, it seems to me that it would be wrong for us to construe these words, which are words of art, "a person whose unexpired term does not exceed," in such a loose way as to embrace a person who, having a short unexpired term in the legal sense, has in addition an interest under the interesse termini. A. T. Lawrence J. says (1) "the defendants are persons interested in the licensed premises for the period of the present and the reversionary leases." I quite grant it; and if it came to the distribution of the compensation fund, their interest under the reversionary lease would have to be provided for; but that is not the question we have to decide. He goes on to say: "The day intervening between the existing and the reversionary leases is inserted to preserve the power of distress, &c. It is not intended to be acted upon by the lessor's entering and occupying or, as would be necessary if he did, obtaining a transfer and making a retransfer of the licences. To give the word 'term' the meaning the defendants contend for would defeat the intention of the statute by imposing the burden upon the person who could not reap the benefit." The Act does impose the burden upon the person who could not reap the benefit; but that the Act does not distribute the burden equally in accordance with the benefit is perfectly plain having regard to the many instances which have been given. I prefer to go, as I think it is fair to go, upon the strict legal construction of the words in the schedule, they being words of art, which in the absence of an overriding context ought

(1) [1909] 2 K. B. at p. 893.

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to have their proper and legal interpretation given them. For these reasons, with great respect to the learned judge, I think his decision was wrong and ought to be reversed.

FLETCHER MOULTON L.J. I am of the same opinion for the same reasons. I will only add a few words. In my opinion the difficulty has been occasioned by not keeping distinct the provisions in the Act which provide a fund out of which compensation is to be paid and the provisions of the Act that regulate the distribution of that compensation when paid. The distribution of the compensation for a suppressed house is a wholly different matter from the contributions towards the fund by the non-suppressed houses. It is quite clear that in the distribution of the compensation for a suppressed house there is an intention to divide it amongst the parties interested in the licensed premises according to their interest. I think it is quite possible that they might include persons whom we should not regard as holding any real interest in land; but that is not a matter that I need deal with. When we come to the formation of the fund it is plainly said that it is to be formed by contributions by the licence-holders, and the amount of that contribution is to be fixed by the sessions. But one relief is given to the licence-holders. They may deduct in certain circumstances a portion of the charge from the rent they pay, if they do pay any rent; and we are referred to the Second Schedule to see what this deduction is to be. I quite agree with the Master of the Rolls that this Second Schedule is a case of something which has no context, and I find in it that a person whose unexpired term does not exceed so many years may deduct so much per cent. of the charge. The natural and ordinary meaning of the word "term" as there used is the term under which he is the licence-holder, that is, under which he is then holding the licensed premises; and when I find at the bottom of the schedule that "the amount deducted shall in no case be more than half the rent," I take it that the rent and the term refer to one and the same tenure. I take the meaning to be that a person holding under a lease which has three years to run is a person whose unexpired term does not exceed three years, and may deduct

the amount there specified. The fact that beyond that lease he may have an interest in the land, whether as remainderman expectant on the termination of a life estate or as a possessor of some reversionary lease, seems to me to be wholly unimportant. The statute has made no attempt to distribute the payment on the unsuppressed licences pro rata amongst the persons interested in those premises. All that it has said is that the licence-holder may deduct something from his rent; he may deduct some of the charge or the whole of it from the rent which he pays to his landlord. No other person is saddled with any portion of the burden. For these reasons I agree with the Master of the Rolls that this appeal should be allowed.

FARWELL L.J. I am of the same opinion. With great respect to the learned judge, I cannot agree with his statement that "the word 'term' standing by itself is not a technical expression." In my opinion both "term" and "rent" are technical expressions or terms of art. "Term" is defined in Coke upon Littleton at p. 45 b thus: "Terminus in the understanding of the law doth not only signify the limits and limitation of time, but also the estate and interest that passeth for that time"; and "rent" at p. 47 a, "A rent must be reserved out of the lands or tenements, whereunto the lessor may have resort or recourse to distrain." Now in this case there is no context, and I see no reason whatever for supposing that the words "term" and "rent" are not used in their ordinary technical meaning. Used as they are in the Second Schedule they are correlative terms. The rent from which deduction is to be made is payable during the term in respect of which it is reserved and in respect of the use of the land for which it is paid. I find it impossible, having once determined that "term" means an existing term of years, which is the only thing properly described as a term creating an interest or estate in land, to read that as coupled with "rent" in that same Second Schedule without seeing that the two relate to each other and that the "term" and the "rent" must refer to the same subject-matter. It is plain that the rent, the deduction from which is not to exceed one half, must be rent which is payable under an existing term. Now it is clear, I think, that a

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lease in reversion, although a perfectly good lease, does not create any estate or interest in land. The point has been recently considered by Swinfen Eady J. in *Lewis* v. *Baker* (1), where the learned judge, quoting Parke B. at p. 694 of 2 Meeson and Welsby, says, "The second lease to commence in futuro was a mere interesse termini. The reversion continued in the lessor till the determination of the first term." And again, on p. 699, "The second lessee has no interest whatever till the determination of the first lease, except a mere interesse termini. It is clear that no reversion could pass by that deed, since it is a mere interest in futuro"; and Swinfen Eady J. goes on, "The nature of an interesse termini was very fully considered in *Doe* v. *Walker*. (2) It was there pointed out that such an interest merely gives a right to have the possession at a future time. It is a right, not an estate." So that it is plain, I think, that there is nothing here which can be called an estate in respect of which there can be a term or a rent. Take the case put in argument of the defendants having contracted with a third person who has got a reversionary term to buy it from him. Is it possible that that could be brought in? And yet I can see no reason why, if the reasoning of the learned judge founded on our making a general equitable assessment is right, it ought not to be done; but it would be impossible, on the suggestion of a third person, to inquire into the rights or compel specific performance of a contract between two other persons. With regard to *Reg.* v. *Vestry of St. Marylebone* (3) I do not think one gets much assistance from considering a statute which is not in pari materia with the case before us; and still more when the object of the Act in that case, the Artizans' and Labourers' Dwellings Act, 1868, is considered, namely, to ascertain the owners of land for the purpose of serving notices upon them, and compelling them to do certain sanitary work. An owner was defined to include all lessees "except persons holding or entitled to the rents and profits of such premises for a term of years of which twenty-one years do not remain unexpired." The Court there considered that they had to find who was substantially the owner for the purpose.

(1) [1905] 1 Ch. 46. (2) (1826) 5 B. & C. 111.
(3) 20 Q. B. D. 415.

Was it the freeholder, or was it a lessee who had in fact an interest existing for more than twenty-one years, although it was obtained by adding two terms together? That appears to me to have no bearing upon the present case, because the word defined was "lessee," and the man was undoubtedly a lessee in possession and a lessee in reversion; and he was not the less so because the part in possession was less than twenty-one years, so that the exception did not apply to him.

I agree that this appeal must be allowed.

Appeal allowed.

Solicitor for appellants: *A. Holte Macpherson.*
Solicitors for respondent: *Johnson, Long & Co.*

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Licensing Acts—Statute — Construction—"Notwithstanding any agreement to the contrary"—Agreement made after passing of Act—Licensing Act, 1904 (4 *Edw.* 7, *c.* 23), *s.* 3, *sub-s.* 3.

By s. 3, sub-s. 3, of the Licensing Act, 1904, "Such deductions from rent as are set out in the Second Schedule to this Act may, notwithstanding any agreement to the contrary, be made by any licence holder who pays a charge under this section":—

Held, that the words "any agreement to the contrary" include agreements made after the passing of the Act.

APPEAL from the Darlington County Court.

The Licensing Act, 1904, provides by s. 3 for the creation of a compensation fund, to be raised by means of charges in respect of all existing on licences payable by the licence holders, and to be applied in compensating persons interested in licences extinguished under the provisions of that Act. By s. 3, sub-s. 3, "Such deductions from rent as are set out in the Second Schedule to this Act may, notwithstanding any agreement to the contrary, be made by any licence holder who pays a charge under this section." By Sched. II. a person whose unexpired term does

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not exceed nine years may deduct a sum equal to 50 per cent. of the charge.

The plaintiff was the mortgagee of a licensed house at Darlington called the Waterloo Hotel, and in June, 1907, he joined with Ind, Coope & Co., the mortgagors, in granting to the defendants a lease of the hotel for a term of ten years from Lady Day, 1907, at a yearly rent of 200*l.* By the terms of the lease the rent was to be paid "clear of all deductions land tax and landlord's property tax only excepted." The lessees covenanted that they would "from time to time and at all times during the said term pay and discharge all rates taxes charges assessments duties impositions and outgoings whatsoever whether parliamentary parochial local or of any description which are now or may at any time hereafter be assessed charged or imposed upon the said demised premises or any part thereof or the owner or occupier in respect thereof or payable by either in respect thereof land tax and landlord's property tax only excepted." In January, 1909, the plaintiff, in consequence of the mortgagors being in financial difficulties, took possession of the premises and gave notice to the defendants to pay the rent to him. The amount of the compensation charge paid by the defendants under s. 3 of the Licensing Act, 1904, in respect of the premises for the year 1908 was 30*l.*, and, as their unexpired term did not then exceed nine years, they claimed to deduct from the rent 50 per cent. of that sum in accordance with the schedule, and they accordingly paid to the plaintiff the quarter's rent due at Lady Day, less the sum of 15*l.* The plaintiff brought this action to recover the 15*l.* as being the balance of rent due. The county court judge gave judgment for the defendants. The plaintiff appealed.

Lowenthal, for the plaintiff. The language of the defendants' covenant is upon the authorities amply wide enough to cover such an imposition as the compensation charge, and the only question is whether that covenant is binding having regard to the provision in s. 3, sub-s. 3, of the Act of 1904 that the licence holder is to be entitled to deduct a certain proportion of the charge "notwithstanding any agreement to the contrary." It is contended

that those words only apply to agreements in existence at the time the Act was passed and do not include future agreements. Parliament may well have thought it unfair that the whole burden of such a novel imposition as the compensation charge should be cast upon the tenant, for it could not possibly have been within the contemplation of the parties at the time of the agreement in cases in which the lease was made before the Act. But in a case like the present, where the lease was made after the passing of the Act, the tenant would enter into the agreement with full knowledge of the extent of the burden he was assuming; and even if the tenant declined to directly assume the burden of the whole charge it would be open to the landlord to impose it upon him indirectly by taking an average of the probable amount of the charge and adding it to the rent. There is nothing in the Act expressly saying that such an agreement shall be illegal, nor can any reason be suggested why the Legislature should have made it so. Wherever the Legislature intends to prohibit parties from contracting themselves out of an Act it always says so in direct terms. Thus in the Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 103 provides that all "agreements made or entered into, or to be made or entered into," for payment of any interest, rent, or other annual payment in full without allowing such deduction of income tax as is authorized by the Act shall be void. So too the Tithe Act, 1891 (54 & 55 Vict. c. 8), s. 1, enacts that tithe rent-charge shall be payable by the owner of the lands "notwithstanding any contract between him and the occupier of such lands, and any contract made between an occupier and owner of lands, after the passing of this Act, for the payment of the tithe rent-charge by the occupier shall be void." In the case of *In re Knight* (1) a local Act of Parliament for rebuilding a church empowered trustees to levy rates upon all houses in the parish, one half to be paid by the landlord and the other half by the tenant; the tenant was to pay the whole rate in the first instance and to deduct a moiety out of the rent; and the landlord was required to allow such deduction "notwithstanding any agreement to the contrary." Parke B. in the course of the argument said: "The words in the local Act may be reasonably construed

(1) (1848) 1 Ex. 802.

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to mean notwithstanding any agreement subsisting between the parties at the time of the passing of that Act. The parties could not foresee that the expense of building a church would be imposed upon the parish. But if the agreement is made after the passing of the Act, then the party who enters into the agreement has no good ground for not paying these expenses." That is a direct authority in favour of the plaintiff's contention.

F. E. Smith, K.C., and *Meynell*, for the defendants. The words "impositions and outgoings" in the covenant are not wide enough to cover the compensation charge. They were not intended to apply to a charge of so novel a character that it could not possibly have been within the contemplation of the parties at the date of the lease. But even if the covenant is wide enough for that purpose the language of the Act is sufficient to prohibit its application. The words "any agreement to the contrary" are perfectly general and are prima facie to be read in their ordinary meaning. The intention of Parliament in using those words was not only to render existing agreements to the contrary illegal, but also to prevent persons from contracting themselves out of the Act in the future. It is clear that this was the object in s. 2, sub-s. 2, which provides for the division of the compensation on non-renewal of the licence among the persons interested in the licence, and says that "the holder of a licence if a tenant shall (notwithstanding any agreement to the contrary) in no case receive a less amount than he would be entitled to as tenant from year to year of the licensed premises." The word "agreement" there necessarily applies to agreements made after the passing of the Act, and if it has that meaning in s. 2 it must presumably have the same meaning in s. 3. The contention of the plaintiff requires the introduction into the section of the word "existing." The dictum of Parke B. in *In re Knight* (1) was obiter only and not binding upon the Court.

Lowenthal in reply.

DARLING J. In this case I think the appeal should be dismissed. The question is whether in this Act of Parliament the

(1) 1 Ex. 802.

words "notwithstanding any agreement to the contrary" mean "notwithstanding any existing agreement to the contrary." For the purpose of construing this section, s. 3, sub-s. 3, I think that no assistance is to be got from looking at the proviso in s. 2, sub-s. 2, for what is there being dealt with consists of interests which arise only under the Act, and consequently the language is not open to two constructions. But I am of opinion that the words "notwithstanding any agreement to the contrary" in this section if read in their ordinary sense apply to any agreement whether made before the Act or after it, and that we cannot adopt Mr. Lowenthal's construction without reading into the section a limitation which is not there. One cannot read modern Acts of Parliament without seeing that there has grown up in recent times a tendency on the part of the Legislature, which did not exist in Parke B.'s day, to interfere with freedom of contract, and to prevent persons from making contracts which they imagine to be for their benefit, but which Parliament in its wisdom thinks may not be for their benefit. This tendency may some day be reversed, but while it lasts I feel bound, when reading such an Act as the one before us, to bear it in mind, and, in the absence of an indication of intention to limit the protection to existing agreements, to construe the words in their wider sense as including agreements made after the passing of the Act. It is true that Parke B. when dealing with the same words in a different Act came to a different conclusion, but he did not lay down any definite rule applicable to all Acts in which those words are to be found. He only said that having regard to the context and the circumstances in which the Act was passed it might "be reasonably construed to mean" what he suggested, and if I could see from other parts of this statute that it was intended only to protect parties from contracts which they had already made, and not from contracts which they were about to make, I should adopt Parke B.'s view. But if he were living to-day and had had experience of the tendency to which I have referred I think he would probably arrive at the same conclusion as to the meaning of this statute as I do. I should add that, apart from the prohibition imposed by the section, I think the words "impositions

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and outgoings" in the covenant are sufficient to cover this compensation charge.

PHILLIMORE J. I am of the same opinion. I agree with my brother that the words of the covenant in the lease are sufficient to throw the burden upon the tenant if the Act of Parliament does not prohibit it. But I cannot when approaching a case of this kind divest myself of my knowledge of the views generally taken by Parliament in such matters at the present day. I agree that the words of the section can be satisfied by making them apply only to contracts existing at the date of the Act, and if there were any reason aliunde for doing so I should be prepared so to apply them. That is practically what Parke B. said in *In re Knight.* (1) But that means that I should be putting a restricted construction on the words because it was necessary to make them fit with other portions of the Act. Prima facie the words refer to any agreement which is in existence at the time when the deduction is sought to be made, and, as I can find no other portion of the Act requiring a restricted construction, I must treat them as applying to agreements made after the passing of the Act as well as to agreements made before it. It struck me at one time that, if that be the true construction of the section, its application to agreements made after the passing of the Act might be rendered futile, because a landlord when granting a lease after the passing of the Act might say to his tenant "I know that I shall have to allow you 15*l.* a year off your rent in respect of the compensation charge, and therefore in order to recoup myself I shall charge you 15*l.* more rent." But on reflection I see that this is not practicable. For, in the first place, the scale of deduction alters from year to year, as the unexpired portion of the term diminishes, and therefore the suggested addition to the rent would be either more than was required to recoup the landlord at the beginning of the lease or insufficient for that purpose at the end; and, secondly, the effect of increasing the rent would be very likely to increase the poor law valuation and thereby to increase the compensation charge which the tenant is to deduct. Therefore I think that the

(1) 1 Ex. 802.

provision in the section is not futile, and that it is not open to the contracting parties to render its operation of no effect. I agree that the appeal must be dismissed.

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Appeal dismissed.

Solicitors for appellant: *Smith, Rundell & Dods, for Wooler & Wooler, Darlington.*

Solicitors for respondents: *Godden, Son & Holme, for Murray & Richmond, Newcastle-on-Tyne.*

J. F. C.

RICKETT *v.* GREEN.

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Dec. 7.

Landlord and Tenant—Re-entry for non-payment of Rent—Recovery of Possession—Half-year's Rent in arrear—"No sufficient distress"—Evidence—Assignee of Lessor—Half-year's Rent accrued due partly before and partly after Assignment—Right of Assignee to maintain Action—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 10—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 139.

By s. 139 of the County Courts Act, 1888, when the rent of premises does not exceed a certain sum, and is in arrear for a half-year, and the landlord has a right to re-enter for non-payment thereof, the landlord may enter a plaint in the county court for the recovery of the premises, and thereupon a summons shall issue to the tenant, and if the tenant shall not shew good cause why the premises should not be recovered, then, on proof (inter alia) "that one half-year's rent was in arrear before the plaint was entered, and that no sufficient distress was then to be found on the premises to countervail such arrear," the judge may order possession of the premises to be given:—

Held, that in order to prove that "no sufficient distress was then to be found on the premises," so as to entitle the landlord to maintain an action for the recovery of possession under the section, it is not necessary that a distress for the half-year's rent shall actually have been levied on the premises, but that the fact of there being no sufficient distress may be proved by other evidence.

A half-year's rent accrued due partly before and partly after the reversion in the premises was assigned, and the assignee brought an action under the above section to recover possession for non-payment of the half-year's rent:—

Held, that he was entitled by virtue of s. 10 of the Conveyancing and Law of Property Act, 1881, to maintain the action.

APPEAL from the Marylebone County Court of Middlesex.

The action was brought to recover possession of a dwelling-

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house, No. 1, Tavistock Road, Paddington, a half-year's rent of the house, and mesne profits up to judgment.

By an agreement in writing not under seal, dated December 19, 1907, one Culver, therein called the landlord, agreed to let and the defendant, therein called the tenant, agreed to take the above-mentioned dwelling-house from December 25, 1907, for the term of three years at the yearly rent of 60*l.*, to be paid by equal quarterly payments on the four usual quarter days, the rent to be clear of all deductions except landlord's property tax. The agreement contained a clause which provided that if and whenever any part of the rent should be in arrear for fourteen days, whether legally demanded or not, or if and whenever there should be a breach of any of the tenant's agreements, the landlord might re-enter upon any part of the premises in the name of the whole, and thereupon the demise should determine.

In entering into the above agreement Culver acted as agent for one Francis Oldham, who was the successor in title of one William Oldham, the lessee of the premises for a term of ninety-nine years from September 29, 1857. On December 21, 1900, Francis Oldham by an indenture of statutory mortgage had demised the premises to one Hewetson for the residue of the term of ninety-nine years less one day by way of mortgage, and the mortgagor covenanted that he would after foreclosure or sale of the premises stand possessed of the last day of the term upon trust to assign or dispose of the same as the mortgagee or any purchaser or purchasers of the premises should direct.

The defendant did not pay the quarter's rent due on December 25, 1908, and on January 18, 1909, Hewetson as mortgagee, in exercise of the power of sale conferred by the Conveyancing and Law of Property Act, 1881, and of all other powers (if any), assigned the premises to the plaintiff, subject to the defendant's agreement of tenancy, for the residue of the term granted by the indenture of mortgage together with the benefit of the mortgagor's covenant contained in the indenture of mortgage with respect to the residue of the term of years granted by the said indenture of lease for ninety-nine years.

By an indenture dated February 16, 1909, which was stated to be supplemental to the deed of assignment of January 18, 1909,

Hewetson as mortgagee and Culver as agent for Oldham, the mortgagor, assigned to the plaintiff, firstly, the benefit of the agreement of December 19, 1907, and, secondly, the sum of 15*l.*, being the quarter's rent of the premises which had accrued due from the defendant on December 25, 1908.

Notice of the assignment was given to the defendant on February 17, 1909.

The defendant did not pay the quarter's rent due on March 25, 1909, there being then a half-year's rent in arrear in respect of the premises. The plaintiff on April 14, 1909, entered a plaint in the Marylebone County Court, under s. 139 of the County Courts Act, 1888 (1), by which the plaintiff claimed possession of the premises, 30*l.*, the half-year's rent in arrear, and mesne profits up to the date of judgment, and on the same day a summons

(1) 51 & 52 Vict. c. 43, s. 139: "When the rent of any corporeal hereditament, where neither the value of the premises nor the rent payable in respect thereof exceeds 100*l.*" (substituted for 50*l.* by s. 3 of the County Courts Act, 1903 (3 Edw. 7, c. 42)) "by the year, shall for one half-year be in arrear, and the landlord shall have right by law to re-enter for the non-payment thereof, he may, without any formal demand or re-entry, enter a plaint in the Court of the district in which the premises lie, for the recovery of the premises, and thereupon a summons shall issue to the tenant, the service whereof shall stand in lieu of a demand and re-entry; and if the tenant shall, five clear days before the return day of such summons, pay into Court all the rent in arrear and the costs, the action shall cease; but if he shall not make such payment, and shall not at the time named in the summons shew good cause why the premises should not be recovered, then, on proof of the yearly value and rent of the premises, and of the fact that one half-year's rent was in arrear before the plaint was entered, and that no sufficient distress was then to be found on the premises to countervail such arrear, and of the landlord's power to re-enter, and of the rent being still in arrear, and of the title of the plaintiff if such title has accrued since the letting of the premises, and of the service of the summons if the defendant shall not appear thereto, the judge may order possession of the premises mentioned in the plaint to be given by the defendant to the plaintiff on or before such day, not being less than four weeks from the day of hearing, as the judge shall think fit to name, unless within that period all the rent in arrear and the costs are paid into Court, and if such order be not obeyed, and such rent and costs are not so paid, the registrar shall, whether such order can be proved to have been served or not, at the instance of the plaintiff issue a warrant authorizing and requiring the bailiff of the Court to give possession of such premises to the plaintiff. . . . . "

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was issued to the defendant in the form No. 248 in the appendix to the County Court Rules, 1903, for recovery of the premises. No distress for the rent in arrear was levied on the premises, but on the hearing of the summons on May 17, 1909, the plaintiff called two witnesses who went over the house with the defendant, one in January, 1909, after the assignment to the plaintiff, and the other on February 18, 1909, and on the day when the summons was issued, and they stated that there were not sufficient goods upon the premises which, if distrained upon and sold, would satisfy the half-year's rent in arrear.

The county court judge delivered the following judgment:— I make an order for possession unless the rent and costs are paid on or before June 24, and an order for payment of rent and costs on June 24. I find as facts (1.) that a half-year's rent is in arrear; and (2.) that there is no sufficient distress. I hold that it is not a condition precedent to proceeding under s. 139 of the County Courts Act, 1888, that a distress should have been put in and proved to be ineffectual, but that insufficiency may be proved without that course being taken, and I find that it has been proved here. As to the plaintiff's right to re-enter I hold that he has that right; he is entitled to the rent as well that accrued before as that accrued since the assignment of the reversion. He is the assignee of the reversion to which the condition of re-entry in the lease is annexed and incident. Half a year's rent is in arrear; so that all the conditions entitling him to re-entry are fulfilled. The Act of 32 Hen. 8, c. 34, does not seem to apply, as the lease is not under seal, but I hold that s. 10 of the Conveyancing and Law of Property Act, 1881, applies, the instrument of demise, in my judgment, being a lease within the meaning of that section. I point out that a difficulty arises (not mentioned in the argument) because the demise is dated December 19 and is for three years from December 25 following, so that it is a lease exceeding three years from the making thereof, which by ss. 1 and 2 of the Statute of Frauds (29 Car. 2, c. 3) is required to be in writing, and which by s. 3 of the Real Property Act, 1845 (8 & 9 Vict. c. 106), is made 'void at law' not being under seal. But I hold that the case is

within *Walsh* v. *Lonsdale* (1) and other cases which decide that a person holding under an agreement of which specific performance would be decreed is in the same position as to liability as if a lease had been executed, and that the defendant must be considered as holding under a valid lease to which s. 10 of the Conveyancing and Law of Property Act, 1881, applies.

The defendant appealed.

Humphrey Williams, for the defendant. The county court judge was wrong in holding that it is not a condition precedent to the right of a landlord to maintain an action to recover possession of premises under s. 139 of the County Courts Act, 1888, that he shall have levied a distress upon the goods on the premises. In order to make that section applicable the plaintiff must prove that "no sufficient distress was then to be found on the premises to countervail such arrear." A distress must be levied before the section can be put in operation. The case is covered by the reasoning of the Court of Appeal in *Thomas* v. *Lulham*. (2) That was a decision upon s. 210 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76)—a section which contains words nearly the same as those above mentioned. It was there held that a distress for rent levied by a landlord did not operate as a waiver of his right of re-entry for non-payment of rent so as to prevent him from maintaining an action to recover possession of the demised premises under that section. Kay L.J. said: "How could it be said that no sufficient distress was to be found without distraining? Goods on the premises are not a distress until they are distrained"; and he went on to say that "the statute evidently contemplates an actual distress." A. L. Smith L.J. also stated that a distress was necessary, and Lord Esher M.R. agreed with both judgments. Those statements of the Lords Justices were not mere dicta, but were part of the ratio decidendi. If the statute had meant that the insufficiency of the distress to satisfy the half-year's rent in arrear might be proved by evidence without a distress being actually levied, it would have said "no sufficient goods were then to be found on the premises." Sect. 139 therefore makes the levying

(1) (1882) 21 Ch. D. 9. (2) [1895] 2 Q. B. 400.

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of a distress the only mode of proving that "no sufficient distress" was to be found upon the premises, and in the absence of that proof the plaintiff cannot maintain this action.

Next, since January 18, 1909, when the plaintiff's interest in the reversion commenced, less than a half-year's rent accrued due. The assignment on February 16, 1909, of the previous quarter's rent was only an assignment of a chose in action within the meaning of s. 25, sub-s. 6, of the Judicature Act, 1873, and the plaintiff could not have distrained for that rent; he could only have distrained for the rent accrued due since the assignment. He has therefore a right of re-entry only in respect of the rent which accrued due since the assignment of the reversion to him: *Crane* v. *Batten*. (1) The rent for the period before the date of the assignment could not be assigned to the plaintiff so as to confer upon him a right of re-entry in respect thereof. Accordingly, though there was a half-year's rent in arrear, only the rent which accrued due to the plaintiff after his interest commenced can be taken into account in computing the half-year's rent in arrear upon which an action can be brought under s. 139 of the County Courts Act, 1888. That was less than a half-year's rent. Sect. 10 of the Conveyancing and Law of Property Act, 1881, has not cured that, as it only passes to the assignee of the reversion a right of re-entry in respect of the rent which accrues due after the date of the assignment. Therefore the provisions of s. 139 of the County Courts Act, 1888, cannot be applied.

Further, the tenancy agreement of December 19, 1907, being under hand only and being for more than three years from the making thereof, is void at law under s. 3 of the Real Property Act, 1845. The county court judge held upon the authority of *Walsh* v. *Lonsdale* (2) that, the defendant being in under the agreement, the plaintiff could have obtained specific performance of it, and that therefore the defendant was in the same position as if a lease under seal had been executed, to which s. 10 of the Conveyancing and Law of Property Act, 1881, applied. But in *Walsh* v. *Lonsdale* (2) a formal lease was contemplated, and therefore the Court would have decreed specific performance of

(1) (1854) 2 W. R. 550; 23 L. T. (O.S.) 220. (2) 21 Ch. D. 9.

the agreement to execute a lease. Here no formal lease was contemplated, and therefore that case is not applicable. The judgment of the county court judge therefore cannot stand.

W. H. Eldridge, for the plaintiff, was not called upon.

DARLING J. In this case I am of opinion that the judgment of the learned county court judge was right, and for the reasons which he has given in his judgment. With regard to the last point which has been argued, this seems to have been taken by the county court judge himself after he had placed a construction upon s. 10 of the Conveyancing and Law of Property Act, 1881. Before dealing with that point I ought to say that I think that the learned judge rightly construed s. 10 of the Act as giving the assignee of the reversion, who has a right of re-entry, the power to avail himself of the procedure to recover possession authorized by s. 139 of the County Courts Act, 1888, although the half-year's rent in arrear is composed of rent partly due before and partly due after the date of the assignment. Having thus construed s. 10, the question occurred to him whether this tenancy agreement was a "lease" within the meaning of s. 10 of the Act of 1881, inasmuch as the agreement was dated December 19, 1907, and the three years were to run from December 25, 1907, so that the lease was one exceeding three years from the making thereof and, not being under seal, was void at law under s. 3 of the Real Property Act, 1845. Though at law it may be void as a lease, still in equity it is looked upon as a lease, and in my judgment it must be treated, as between the parties, as if it were a lease under seal. A Court of Equity would look upon the matter as if a lease under seal had been granted. Upon the case to which we have been referred the county court judge came to a right conclusion upon this point, and the agreement must be treated as a "lease" for the purposes of s. 10 of the Act of 1881, and for other purposes also.

The only point remaining is that, though a half-year's rent was in arrear when this action was brought, the provisions of s. 139 of the County Courts Act, 1888, cannot be enforced against the defendant because no distress has actually been levied upon the goods on the premises. The contention is that s. 139

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prescribes as a condition precedent to the right of a landlord to maintain an action for the recovery of possession of premises under that section that the insufficiency of the goods to satisfy the half-year's rent in arrear must be ascertained by a distress being actually levied. The words of the section are that on proof "that one half-year's rent was in arrear before the plaint was entered, and that no sufficient distress was then to be found on the premises to countervail such arrear," and various other matters, possession may be ordered to be given. Now goods taken under a distress for rent may or may not turn out to be of sufficient value when sold to pay the arrears of rent. In old days a landlord who levied a distress had no power to sell the goods distrained, but could only detain them as security for the rent in arrear. Now by statute a landlord has power to sell the goods which have been distrained, but he cannot sell immediately; he must wait a certain time. Until the goods seized are sold it may be impossible for a landlord to say whether they are of sufficient value to satisfy the rent in arrear. The insufficiency of the goods upon the premises to satisfy the arrears of rent is called in s. 139 of the County Courts Act, 1888, "no sufficient distress." These words do not seem to me to lend any support to the argument that the insufficiency of the goods to satisfy the arrears of rent can only be ascertained by levying a distress. The language of Kay L.J. in *Thomas* v. *Lulham* (1) has been very properly pressed upon us. The question in that case was whether a distress for rent by a landlord operated as a waiver of his right of re-entry for non-payment of that rent, there still remaining a half-year's rent due, so as to prevent him from maintaining an action to recover possession of the demised premises under s. 210 of the Common Law Procedure Act, 1852, a section which contains very similar words to those in s. 139 of the County Courts Act, 1888. The learned Lord Justice, dealing with the question of waiver, said, "How could it be said that no sufficient distress was to be found without distraining?" He does not directly answer that question, but goes on: "Goods on the premises are not a distress until they are distrained, and the landlord cannot tell what is to be found on the premises without

(1) [1895] 2 Q. B. 400.

putting in a distress." With the greatest respect that really is not so, as the present case shews. The landlord may be able to tell without distraining; for instance, he may be able by looking in at the window to see what goods are there. The Lord Justice says that the landlord "has no right to enter merely to see what goods are there. The statute evidently contemplates an actual distress." It is quite true that the landlord has no right to enter, but the tenant may ask him to come in and look for himself. The fact that the landlord has no right to enter the premises merely to see what goods are there does not, in my opinion, shew that he must put in a distress before proceeding to enforce his rights under the section. Therefore it seems to me to be wrong to say that an actual distress must be levied before it can be proved that "no sufficient distress was then to be found on the premises" within the meaning of s. 139 of the County Courts Act, 1888. That being so, it was a question of fact for the county court judge to determine upon the evidence before him whether there was a sufficient distress upon the premises or not. The county court judge upon the evidence came to the conclusion that there was no sufficient distress, and I think there was evidence upon which he was entitled so to find. If I may say so, I think that he came to a right conclusion of fact. The judgment of the county court judge must therefore be affirmed and the appeal must be dismissed.

PHILLIMORE J. I am of the same opinion, and I have nothing to add to the judgment of my learned brother and that of the county court judge, but I think that it is due to the argument which we have heard from the defendant's counsel that I should state in a few words my view as to the proper meaning to be attached to the decision in *Thomas* v. *Lulham*. (1) No doubt the language of Kay L.J. as well as that of A. L. Smith L.J. gives some colour to the argument which has been pressed upon us on behalf of the defendant. The language of Lord Esher M.R., though he expresses his agreement with the judgments of the Lords Justices, is not so wide, and is confined

(1) [1895] 2 Q. B. 400.

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Phillimore J.

to the question of waiver, which was the only question before the Court. The decision in that case was upon another Act, namely, s. 210 of the Common Law Procedure Act, 1852. Moreover the only question which the Court had there to decide was whether a distress by the landlord was a waiver of his right to maintain an action to recover possession under the section. The Lords Justices had not to consider the question which we have now before us, namely, whether the levying of a distress was a condition precedent to the right to maintain an action under s. 139 of the County Courts Act, 1888, for the recovery of the demised premises. I do not believe that Kay L.J. or A. L. Smith L.J. thought that there might not be cases in which the landlord would be able to ascertain that there was no sufficient distress on the premises to countervail the half-year's rent in arrear without going through the form of levying a distress.

Appeal dismissed.

Solicitors for plaintiff: *H. B. Worrell & Son.*
Solicitors for defendant: *Williams & Broxholm.*

W. F. B.

[IN THE COURT OF APPEAL.]

C. A.
1909
Dec. 8.

DENDY *v.* EVANS.

Landlord and Tenant—Forfeiture—Relief—Writ claiming Possession—Election to determine Tenancy—Underlease—Relief granted to Lessee—Effect on Underlease—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict.* c. 41), *s.* 14.

A lease of premises contained a covenant by the lessee to repair, and a proviso for re-entry upon breach of any covenant in the lease. The lessee sub-let to the defendant, the underlease containing a covenant to repair similar to that in the head lease, and a similar proviso for re-entry. The premises having become out of repair, the lessor issued a writ against the lessee to recover possession. The lessee thereupon assigned the lease, subject to and with benefit of the underlease, to an assignee, who obtained an order, under s. 14, sub-s. 2, of the Conveyancing and Law of Property Act, 1881, that all further proceedings in the action should be stayed, and that the assignee should have relief from the forfeiture and should hold the premises according to the old lease without any new lease. The assignee then brought an action against the defendant for rent due upon the underlease subsequent to the issue and service of the writ to recover possession:—

Held, affirming the decision of Darling J., [1909] 2 K. B. 894, that though the issue and service of the writ to recover possession operated as a final election by the lessor to determine the lease, the effect of the order for relief was to restore the lease as if it had never become forfeited, and therefore the underlease also remained in existence, and that the plaintiff was entitled to recover.

Appeal from the decision of Darling J. (1)

The action in which the order appealed from was made was an action to recover 60*l.*, being three quarters' rent of certain premises. By an indenture of lease dated April 24, 1891, Daniel Dendy demised the premises in question to Walter Wallis for the term of twenty-one years from March 25, 1891, at a yearly rent, and Wallis covenanted to repair and keep in repair the buildings upon the demised premises. The lease contained a proviso for re-entry upon breach of any covenant therein. By an indenture of underlease dated February 11, 1907, Wallis demised the premises to Alfred Evans for the remainder of the above-mentioned term of twenty-one years less three days at

(1) [1909] 2 K. B. 894.

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the yearly rent of 80*l*. The underlease contained a covenant, in similar terms to the covenant in the lease of April 24, 1891, by the underlessee to repair and keep in repair the demised premises, and also a covenant by him to observe and perform all the covenants under and subject to which the premises were held by the underlessor and on the underlessor's part to be observed and performed (save only the payment of rent), and to indemnify the underlessor against all losses, damages, and costs by reason of the non-observance or non-performance of the said covenants; and the underlease contained a proviso for re-entry upon breach of any of the covenants therein contained.

Alfred Evans died on November 29, 1907, having by his will appointed the defendants to be trustees and executors thereof.

On October 27, 1908, Daniel Dendy, after having served the requisite notice under s. 14 of the Conveyancing Act, 1881, issued a writ in the King's Bench Division against Wallis to recover possession of the premises upon a forfeiture of the term by reason of a breach of the covenant to repair. Wallis gave notice of this action to the defendants, and also served upon them a notice requiring them to execute certain repairs to the premises as specified in a schedule annexed to the notice.

By an indenture dated February 16, 1909, Wallis as beneficial owner assigned to the plaintiff, Kate Dendy, the premises comprised in the lease of April 24, 1891, for the residue of the unexpired term granted thereby, subject to the indenture of underlease of February 11, 1907, and with benefit of the arrears of rent thereunder due from Alfred Evans or his executors from June 24, 1908. The plaintiff thereupon applied in the action of *Dendy* v. *Wallis* (1) for relief against the forfeiture under s. 14 of the Conveyancing Act, 1881, and on May 28, 1909, an order was made by the Master by consent that "all further proceedings in this action be stayed and that the applicant be relieved from any forfeiture of the lease dated the 24th day of April, 1891, referred to in the indorsement of the writ in this action, and that she do hold the demised premises according to the said lease without any new lease."

The plaintiff thereupon brought this action against the

(1) Unreported.

defendants as executors of Alfred Evans to recover 60*l.*, being three quarters' rent of the premises to March 25, 1909, due under the underlease. Upon an application under Order XIV. for leave to sign final judgment for the amount claimed, the defendants contended that Daniel Dendy by the issue and service of the writ to recover possession irrevocably determined the lease to Wallis as from the date of the service, and that the underlease was also thereby similarly determined. The defendants having obtained leave to defend, the action was heard by Darling J., who held that, though the issue and service of the writ to recover possession operated as a final election by the lessor to determine the lease, the effect of the subsequent order for relief against forfeiture was to restore the lease as if it had never been forfeited, and therefore the underlease also remained in existence, and the plaintiff was entitled to recover the amount claimed.

Against this decision the defendants appealed.

J. A. Foote, K.C., and *Ward Coldridge*, for the appellants, repeated the arguments used by them in the Court below, and in addition referred to the following cases :—*Grimwood* v. *Moss* (1) ; *Hare* v. *Elms* (2) ; *Taylor* v. *Knight* (3) ; *Bowser* v. *Colby* (4) ; *Doe* d. *Wyatt* v. *Byron*. (5)

Pollock, K.C., and *Schiller*, for the respondent, were not called upon.

COZENS-HARDY M.R. This appeal has been very strenuously and ably argued, but I am unable to doubt that the judgment of Darling J. is quite correct. The material facts may be shortly stated. [The Master of the Rolls stated the facts and the terms of the order granting relief as above set out, and continued :—] The question which has been argued before us is this : it is said that the issue of the writ for possession by the lessor was an irrevocable election by him to treat the lease as void, and not only so, but that it made the lease void and necessarily put an end to the

(1) (1872) L. R. 7 C. P. 360.
(2) [1893] 1 Q. B. 604.
(3) (1725) 4 Vin. Abr. Ch. 407.
(4) (1841) 1 Hare, 109.
(5) (1845) 1 C. B. 623.

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underlease also. Now is there any foundation for that proposition? I think it is not unimportant to consider what was the old law on the subject of granting relief against forfeiture. I am quite aware that the old law prior to the Conveyancing and Law of Property Act, 1881, did not apply to forfeiture for breach of a covenant to repair, but only of a covenant for payment of rent. But what was the old law in that respect prior to the Landlord and Tenant Act, 1730? I think it is reasonably plain. The landlord commenced his action of ejectment under the proviso for re-entry for non-payment of rent. Two things might happen. The action might or might not proceed to judgment with execution. What the tenant could do in the way of obtaining relief was to file his bill in the old Court of Chancery, which would take varying forms according as the ejectment action had or had not proceeded to judgment and final delivery of possession. In the first case, where the bill was filed before judgment, the relief claimed would be an injunction to restrain further proceedings in the action at law on the terms of the lessee paying the arrears of rent. The effect of that was that no new lease was ordered to be granted by the Court of Chancery. The Court simply granted an injunction to restrain the landlord from proceeding to enforce his right of re-entry which he said he had, and which the lessee by the necessity of the case was bound to admit that he had. If on the other hand the ejectment action had proceeded to judgment, the lease was gone at law, and the Court of Chancery could not set it up again, but it could grant relief on similar terms, and it was necessary in that case to make an order that the landlord should grant a new lease. Under these circumstances it seems to me a mistake to say that the only thing which the Court of Chancery could do was to grant a new lease. I will only refer to the judgment of Wigram V.-C. in *Bowser* v. *Colby* (1), where he says: "It is obvious that there were two distinct cases which might occur before the statute;—first, where the lessor having brought his ejectment, the tenant, before judgment or before execution, filed his bill for relief, and obtained an injunction to restrain the lessor from turning him out of possession. In that case, the tenant being enabled to continue

(1) 1 Hare, 109, at p. 126.

in possession, and remaining in the meantime a debtor to the landlord for the amount of the rent, the latter, until the hearing of the cause, would have no security for his rent, unless the amount due were paid into Court; secondly, there was the case where the lessor actually recovered possession in the ejectment; and the only relief which the tenant could have, was such as the Court might give him at the hearing." Now to my mind it is perfectly clear that the old rule of the Court of Chancery centuries ago was inconsistent with the view which has been argued before us, namely, that the mere issue of the writ without more terminated the interest of the lessee. Then followed the statutory enactments on the subject, the first of which, the Landlord and Tenant Act, 1730, by s. 3 recognized and affirmed the long-established jurisdiction of the Court of Chancery in granting injunctions in cases like the present, but limited the jurisdiction by fixing a time within which the application must be made and by certain other conditions, and then by s. 4 in terms granted a new power for the first time to a Court of law, though it may be that even before that statute Courts of law, without any express authority, did grant similar relief. Sect. 4, reading it shortly, says that if the tenant or his assignee shall at any time before the trial in such ejectment pay all the rent and arrears, then "all further proceedings on the ejectment shall cease and be discontinued," and if such lessee shall be relieved in equity he "shall have hold and enjoy the demised lands according to the lease thereof made without any new lease to be thereof made."

That provision was substantially re-enacted by the Common Law Procedure Act, 1852, s. 212, and, though not strictly relevant, I think I ought to say that in my view the meaning of this enactment is that the property is held "according to the lease thereof made," not according to a new lease thereof made in similar terms—that is to say, the lease is treated as never having been forfeited at all.

It is true that we are not called upon to decide this case upon the interpretation of either of these two Acts of Parliament or upon the old procedure, but it has been necessary at least to consider them, because it is of very great importance to arrive

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at a conclusion as to what is the effect of the mere issue of the writ not followed by judgment in the action. Counsel for the appellant has relied on the judgment of Day J. in *Hare* v. *Elms* (1), but that learned judge, after elaborately stating the history of the law, refers to *Doe* d. *Wyatt* v. *Byron* (2) and says (3): "In *Doe* d. *Wyatt* v. *Byron* (2) there was no judgment in ejectment at all. The defendants, who were underlessees of the term less two days, appeared to the writ as soon as they heard of it, and before judgment, and asked the judge to exercise his jurisdiction by allowing them to pay the rent and costs into Court at once. They asked to be allowed to pay the rent and costs into Court before judgment and execution took place, and asked for a stay of proceedings upon payment of the rent and costs under 4 Geo. 2, c. 28. The judge allowed that to be done, and under his direction the rent and costs were paid to the lessor. Everybody therefore remained in the same position as they always had been. The judge's decision was upheld by the Court. That case, however, is no authority for the proposition that an underlessee has a right to deal with the matter in the absence of the original lessee. The lessees there were not necessary parties at all. The lease had never been determined; there had been no judgment or entry in ejectment."

I therefore think that it is reasonably clear that there was nothing in the issue of the writ in the action of *Dendy* v. *Wallis* (4) which put an end to the lease, and, further, that the mere issue of the writ in that action had no effect or operation upon the underlease.

Now comes the consideration of the section of the statute under which alone the present question arises. That is s. 14 of the Conveyancing Act, 1881. After first providing that there must be notice given, which was given here, before a right of entry or forfeiture arises, sub-s. 2 says this: "Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief; and the Court may grant or refuse relief, as the Court, having regard to

(1) [1893] 1 Q. B. 604.
(2) 1 C. B. 623.
(3) [1893] 1 Q. B. 609.
(4) Unreported.

the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court, in the circumstances of each case, thinks fit."

Here the Master has thought fit to make an order, following the settled statute-authorized practice where relief was given against forfeiture for non-payment of rent, the language of the order being that "all further proceedings in this action be stayed and that the applicant be relieved from any forfeiture of the lease dated the 24th day of April, 1891, referred to in the indorsement of the writ in this action, and that she do hold the demised premises according to the said lease without any new lease."

Now what is the meaning of that? In my opinion it means this, that the right of entry for forfeiture is got rid of.

The ground on which the plaintiff sought relief has been disposed of by the order made by the Court under s. 14. For all purposes, and as between all parties, rights and liabilities are absolutely unaffected by the circumstance that there was a breach of covenant and that there was a writ issued not followed by judgment or entry, and I cannot listen for one moment to the suggestion that the effect of this is merely to resuscitate the lease from the date of the order or to grant a new lease from the date of the order, leaving the underlease to perish, although the original cause of mischief, namely, the forfeiture by the lessee, has been absolutely and entirely got rid of. In my opinion that would be an unreasonable and unnatural construction, and I think Darling J. was quite right when he said in effect that the lease continued for all purposes; it is the original lease which continues, not a new lease; and, that being so, the derivative lease which was created out of the original lease has not ceased to exist, but is still a valid lease in respect of which the defendants are liable to the plaintiff on the covenants.

For these reasons, which are substantially those given by Darling J., I think that this appeal fails and must be dismissed with costs.

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FLETCHER MOULTON L.J. I am of the same opinion.

FARWELL L.J. I agree. The relief against forfeiture is an old head of equity, the principle being that the proviso for re-entry, which enabled the forfeiture, was intended as a security for the performance of some specific act, and, when the Court was satisfied that such act had been performed, it gave relief against the forfeiture, as pointed out by Wigram V.-C. in *Bowser* v. *Colby* (1), already cited by the Master of the Rolls. The Conveyancing Act has enlarged the ambit of cases in which relief can be given, and has provided that the relief shall be given in the form that no forfeiture has taken place. This appears from Lord Davey's definition of "relief" in *Nind* v. *Nineteenth Century Building Society.* (2) Referring to this section he says (3): "The words 'relief' and 'relieve' are the appropriate terms to describe the remedial action of the Court of Equity in cases where a penalty or forfeiture has been incurred, which the Court thinks it equitable that the complainant should not lie under or suffer." It is not the case of the estate having gone and a new estate being now created; it is that the Court says the true meaning of the parties being that the right of re-entry is a security for the performance of the covenant, and that the lessee is ready and willing and offers to do or has done equity, the Act now enables this Court to give him relief on the footing that there shall be no forfeiture at all. This is apparent, not only from what Lord Davey said, but from what Lord Hatherley said in a mortgage case, *Thompson* v. *Hudson* (4), which is, of course, on the same basis: "Equity regards the security that has been given as a mere pledge for the debt, and it will not allow . . . . a forfeiture of the property pledged . . . . on the ground that equity regards the contemplated forfeiture which might take place at law with reference to the estate as in the nature of a penal provision, against which equity will relieve when the object in view, namely, the securing of the debt, is attained." The forfeiture is stopped in limine; so that there

(1) 1 Hare, 109.
(2) [1894] 2 Q. B. 226.
(3) Ibid. at p. 233.
(4) (1869) L. R. 4 H. L. 1, at p. 15.

is no question of any destruction of an estate which has to be called into existence again.

I entirely agree with what the Master of the Rolls has said in his judgment.

Appeal dismissed.

Solicitors for appellants: *Upton, Britton & Lumb.*

Solicitors for respondent: *Hare & Co., for Cooper & Norgate, East Dereham.*

G. A. S.

[IN THE COURT OF APPEAL.]

THE GOVERNORS OF ST. THOMAS'S HOSPITAL *v.* RICHARDSON.

Landlord and Tenant—Breach of Covenant—Trustee of Leaseholds—Lien—Right of Indemnity—Bankruptcy of Trustee—Debt provable in Bankruptcy—Property held by the Bankrupt as Trustee for any other Person—Position of Trustee in Bankruptcy—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 37 *and* 44.

Where a trustee who holds property to secure his own right of indemnity in priority to all claims of his cestui que trust becomes bankrupt, and the retention of such property—e.g., leaseholds with onerous covenants—is necessary to give full effect to such right, the legal estate in the property and right to possession vest in the trustee in bankruptcy to the extent to which they were vested in the bankrupt.

In 1894 R. was the assignee of leaseholds with onerous covenants as trustee for his wife; in 1895 R. was adjudicated bankrupt; in 1896 the trustee in bankruptcy assigned the leaseholds back again to R. as trustee for his wife, and R. obtained his discharge. In 1908 the lessors, who had had no notice of the fact that R. was a trustee, or of his bankruptcy, brought an action against R. for arrears of rent and for damages for breach of covenant to repair. R. pleaded the bankruptcy proceedings as a defence:—

Held, reversing the decision of Hamilton J., that the leaseholds vested in the trustee in bankruptcy, who held them, subject to satisfying his own lien and right of indemnity, for R.'s wife; that the leaseholds passed back again to R. by the assignment of 1896; and that the bankruptcy was no defence to the action, and R. was liable as assignee.

APPEAL from a judgment of Hamilton J. sitting without a jury.

The case is mainly reported for the sake of the observations of

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the Court as to the position of a trustee of leaseholds on his becoming bankrupt, and of his trustee in bankruptcy. The facts, which were somewhat special and complicated, were stated by the Court as follows:

The plaintiffs were the freeholders of property in St. Thomas's Square, Hackney, who in 1848 and 1850 granted leases of five houses for terms of years expiring at Lady Day, 1907. The leases were in the same form, and for the purposes of this report it will be sufficient to refer to one lease only.

The lease contained, in addition to the usual covenant for payment of rent, covenants to repair, to yield up in repair at the end of the term, to insure, and not to assign without the licence of the lessors being previously obtained.

In 1889, the leases became vested in the defendant Harry Richardson for the residue of the terms. In the same year Richardson mortgaged these leases by demise to a building society to secure certain sums of money which by the rules of the society were repayable by instalments.

In November, 1894, the defendant entered into an agreement for the sale of these leases to his wife for 150*l.*, subject to the mortgage thereon, which then amounted to 369*l.* 13*s.* 9*d.*; by this agreement he acknowledged the receipt of the 150*l.* paid by his wife out of her separate property. She was to accept the defendant's title, and by clause 4 the defendant was on demand to execute, provided the lessors' consent was previously obtained by his wife, a proper assignment of the property to her or her nominee or nominees. No assignment to the wife was in fact made, and no application was ever made to the lessors for a licence to assign, but the learned judge in the Court below found as a fact that the agreement represented a real transaction, and that the 150*l.* was actually paid by the wife. By clause 5 the wife expressly covenanted to pay the rent and perform the covenants contained in the leases, to discharge the mortgage debt, and to keep the defendant, his estate and effects, indemnified against all claims in respect thereof.

In October, 1895, the defendant was adjudged a bankrupt, and one Izard was appointed trustee in the bankruptcy. At this date a half-year's rent was in arrear.

In September, 1896, the trustee in bankruptcy, with the concurrence of the committee of inspection, sold to the defendant's wife, in consideration of moneys sufficient to pay 10*s.* in the pound, all the bankrupt's property, and duly assigned the same in general terms sufficient to pass the legal estate (or terms), if it was then vested in the trustee in bankruptcy, to the defendant as trustee for his wife.

The plaintiffs had no notice of the agreement for sale of November, 1894, or of the bankruptcy of the defendant, or of the assignment by the trustee in bankruptcy. So far as they were aware the defendant continued to be liable to pay the rents and perform the covenants contained in the leases as assignee of the terms.

On September 30, 1896, the defendant obtained his discharge.

In April, 1908, the plaintiffs commenced this action against the defendant to recover damages for breaches of the covenants to repair and yield up in repair and insure, and for arrears of rent.

The defendant pleaded that (1.) the terms of years did not pass to Izard, the trustee in bankruptcy, but were held by him, the defendant, as trustee for his wife, and (2.) that the causes of action sued upon accrued prior to his dischage and were in respect of debts provable in the bankruptcy.

Hamilton J. held, as a matter of law, that the plaintiffs had no remedy against the defendant and gave judgment for the defendant with costs.

The plaintiffs appealed. The appeal was heard on December 6 and 7, 1909.

Atkin, K.C., and *Hon. M. Macnaghten*, for the appellants. The defendant is in this dilemma: either the terms in these leases did pass to the trustee in bankruptcy, when the effect of the assignment of 1896 would be to vest them again in the defendant and so make him liable, or they did not vest in the trustee in bankruptcy, and then any claim in respect of the leases was not a debt provable in bankruptcy, and in this way the defendant would be liable. The leases vested in the trustee in bankruptcy, and though the leases contained onerous covenants the trustee

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might have disclaimed them: *In re Maughan, Ex parte Monkhouse* (1); but this was not done. The defendant at the time of his bankruptcy had a lien on the property and a right to indemnify himself against all the liabilities of the leases, or to call upon his cestui que trust to indemnify him, and if the cestui que trust had failed so to do the defendant could have entered and collected the rents for his own indemnity; the defendant therefore had a substantial interest in these leaseholds which passed to his trustee in bankruptcy, who held them upon the same terms and subject to the same equities as the bankrupt: *Pearce* v. *Bastable's Trustee in Bankruptcy*. (2)

On a contract being entered into for the sale of leaseholds the vendor still has a very substantial interest in the property and is in a somewhat different position from a vendor of freeholds, whose position is discussed in *Shaw* v. *Foster* (3) and *Lysaght* v. *Edwards*. (4) The defendant was not a "bare trustee" for his wife. The combined effect, therefore, of the bankruptcy and the subsequent assignment of September, 1896, was to leave matters precisely as they had been prior to the bankruptcy. The defendant is consequently liable to the lessors.

Further, the assignment of November, 1894, contains express covenants by the defendant's wife to indemnify him against the rents and the mortgage debt.

Clayton, K.C., and *Tyfield*, for the respondent. With reference to any liabilities prior to the bankruptcy, the plaintiffs might have proved for them and for future liabilities under s. 37 of the Bankruptcy Act, 1883, and the bankrupt having now obtained his discharge, this liability is wiped out. That these contingent liabilities were possible of proof in bankruptcy seems clear from *Hardy* v. *Fothergill* (5) and *Flint* v. *Barnard*. (6) The building society also could have proved in respect of the instalments payable at future dates, but did not do so.

If the legal estate in these leases did pass to the trustee in bankruptcy, then admittedly the defendant is liable by reason of the fresh assignment to him by the trustee, but only from the

(1) (1885) 14 Q. B. D. 956.
(2) [1901] 2 Ch. 122.
(3) (1872) L. R. 5 H. L. 321.
(4) (1876) 2 Ch. D. 499.
(5) (1888) 13 App. Cas. 351.
(6) (1888) 22 Q. B. D. 90.

date of that assignment. The legal estate in these leases did not pass to the trustee in bankruptcy. By s. 44 of the Bankruptcy Act, 1883, "property held by the bankrupt in trust for another person" does not pass; the purchase-money had been paid, and the defendant was nothing more than a "bare trustee" of these leases for his wife: *Lysaght* v. *Edwards* (1); *Christie* v. *Ovington*. (2) The defendant had no beneficial interest whatever in these leases, and this, according to the dictum of Jessel M.R. in *Morgan* v. *Swansea Urban Sanitary Authority* (3), is the true test. The bankrupt is not entitled to indemnity from the trust estate until he is under actual liability. At the date of the bankruptcy the defendant was not liable; the bankruptcy relieves him of all liability. No right had attached to these leases which gave any beneficial interest to the bankrupt, and the right of indemnity depends on liability.

[FARWELL L.J. referred to *Carvalho* v. *Burn*. (4)]

In that case there was no equitable assignment. *Parnham* v. *Hurst* (5) deals with *Carvalho* v. *Burn*. (4)

At the time of his bankruptcy the defendant had no lien on these leases, no right of indemnity against his cestui que trust; he was nothing but a "bare trustee," and consequently no legal estate passed from him to the trustee in bankruptcy. The bankruptcy proceedings are a complete defence to this action.

Atkin, K.C., in reply.

Cur. adv. vult.

Dec. 16. COZENS-HARDY M.R. This appeal discloses a remarkable state of facts, and raises some questions not free from difficulty. [The Master of the Rolls stated the facts, and continued:—] It is conceded that if the term vested in the trustee in bankruptcy the defendant is liable by reason of a fresh title which he acquired after the bankruptcy. In these circumstances the learned judge has held, as a matter of law, that the plaintiffs have no remedy against the defendant.

Now it is necessary to consider carefully what is the position of a trustee, A., in whom a leasehold term is vested as

(1) 2 Ch. D. 499.
(2) (1875) 1 Ch. D. 279.
(3) (1878) 9 Ch. D. 582, at p. 585.
(4) (1833) 4 B. & Ad. 382, 393.
(5) (1841) 8 M. & W. 743.

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assignee, his sole cestui que trust being B. If all rent has been paid and all liabilities for breach of covenant have been satisfied up to date, A. is bound on request to assign to B., and he must rest content with the ordinary covenant by B. contained in such assignment. If, however, there is rent in arrear for which the lessor might sue A., or if there are breaches of covenant for which the lessor might sue A., B. cannot require an assignment until these liabilities have been got rid of. And it is irrelevant to urge that the lessor has not sued, or that A. has not paid. A.'s right to indemnity exists before payment: *Lacey* v. *Hill.* (1) In respect of this right of indemnity A. has a first charge or lien upon the trust property, and he cannot be compelled to assign to B. until this charge or lien is satisfied: *In re Exhall Coal Co., Ld.* (2) Moreover, A. can maintain an action to enforce his charge or lien. As Kay J. said in *In re Pumfrey* (3), "His right of indemnity gives him a right of charge or lien upon the trust estates. He has a right to come and say, I claim to have my right of indemnity. I am now called upon to pay a sum of money for which I have a right of indemnity out of the trust estate, and that gives me the right in equity to have a charge against the estate, and to have the charge enforced by the process of the Court of Equity." What then was the state of things immediately before the defendant's bankruptcy? Half a year's rent was then in arrear. The trustee would have been bound to admit a proof by the plaintiffs. If so, it seems to me impossible to doubt that the trustee, as representing the bankrupt's estate, had a charge or lien upon the leasehold property precisely similar to that which the defendant before his bankruptcy would have had in respect of liabilities presently enforceable.

If this be so, the question for decision turns solely upon the true meaning of that part of s. 44 of the Bankruptcy Act, 1883, which excludes from property vesting in the trustee "property held by the bankrupt in trust for any other person," and we are not left without guidance in construing those words, which are merely a re-enactment of prior legislation. There is a dictum

(1) (1874) L. R. 18 Eq. 182. (2) (1866) 35 Beav. 449.
(3) (1882) 22 Ch D. 255, at p. 262.

of Sir George Jessel in *Morgan* v. *Swansea Urban Sanitary Authority* (1), where he says, "under the Bankruptcy Act where a trustee has no beneficial interest, the legal estate does not pass, but where he has it does pass," and he points out that where a person has a lien on the estate he is not bound to convey until the lien is satisfied. This is in accordance with the considered judgment of the Court of King's Bench delivered by Littledale J. in *Carvalho* v. *Burn* (2): "It is quite clear that the assignment vested in the assignees all the personal estate and effects in which the bankrupt was, at the time of the act of bankruptcy, *beneficially* interested (with the statutory exceptions, 6 Geo. 4, c. 16, ss. 81, 82, 86, 112); but as the object of the assignment of the bankrupt's property is, that it may be applied to the payment of his debts, it is equally clear that nothing passed by it which the bankrupt then held in trust for others, or in which he had only a mere legal interest." Then he cites four cases, and continues: "But if at the time of the act of bankruptcy, the bankrupt possessed a possibility of interest from which a benefit to his creditors might result, if he had the legal interest in any property, and it was uncertain whether he would hold any part of that property, or if any, what part, as a trustee for others, the whole would pass by the assignment: it could not remain in the bankrupt subject to be transferred on a future contingency: and if it did pass to the assignees, it could not be divested out of them in whole or in part by the happening of events subsequent to the act of bankruptcy, which might make them hold the whole, or some specific part as trustees merely; for there is no provision in the statute which takes a right out of the assignees, that has once been vested in them."

It is obvious that it was to the interest of the creditors that the trustee should have the legal term to aid him in enforcing his lien, or charge, so as to indemnify the bankrupt's estate against the proof, and it is of course irrelevant to observe that in fact proof was not made. The result is that, in my opinion, the term vested in the trustee in bankruptcy, who held it, subject to satisfying his own lien, for Mrs. Richardson, and that it passed from the trustee to the defendant under a new title. This being

(1) 9 Ch. D. 582, at p. 585. (2) 4 B. & Ad. 382, at p. 393.

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so, the defendant is liable as assignee, and his bankruptcy is no answer.

In my opinion this appeal succeeds, and the plaintiffs are entitled to judgment. The figures will probably be agreed. If not there must be a reference. The respondent must pay the costs here and below.

FLETCHER MOULTON L.J. At first sight this case appears to present many difficulties, but in my opinion they will be found on closer examination to exist rather in appearance than in reality. They take their rise from the peculiar position which a trustee occupies when the legal estate of the trust property is vested in him, and when, by reason of his being such legal owner, he is under liabilities to third persons. An excellent example of this is the case where he is lessee under a lease the beneficial interest in which is in the cestui que trust. The legal title is in him with all its consequences. So far as the lessor is concerned he is personally liable for the payment of the rent and the performance of the covenants. But the cestui que trust is bound to indemnify him for the sums he has thus to pay, and he is entitled to retain or deduct them out of the rents and profits of the property, and has a right against the property itself for any portion of these sums which the cestui que trust does not reimburse him. The same results follow in other cases, but, as in the present case the property which we have to consider is in fact a lease, it is not necessary to examine them.

Now let us consider the case of the bankruptcy of a trustee who occupies this position. As a general rule when bankruptcy occurs, the property of the bankrupt vests in his trustee for division among his creditors. But by s. 44 the property so divisible does not include "property held by the bankrupt on trust for any other person." This follows from the principle that the Court of Bankruptcy is a Court of Equity, and was the law long before it was specifically provided by statute. The meaning of the provision is therefore evident; it is that property held by the bankrupt does not go to form part of his divisible estate, if and so far as he holds it in trust for another person. But as far as the bankrupt has a beneficial interest in property it passes to

his trustee to form part of his divisible estate, and this none the less because the balance of the property is held by the bankrupt in trust for others. The trustee in bankruptcy will take the same position in respect to the property as the bankrupt; he will hold it on the same trusts and be entitled to the same beneficial interest and no more.

To give to the trustee in bankruptcy this interest it is not necessary that he should formally become trustee of the property in question. It would suffice that, from and after the occurrence of the bankruptcy, the interest which the bankrupt previously enjoyed beneficially is now held by him in trust for the trustee in bankruptcy as representing his estate. And this will often be the more convenient course to pursue where the trust property is of the nature of a fund in Court or securities involving no liabilities so far as the trustee is concerned. In cases of such property the trustee in bankruptcy may, for instance, sell his beneficial interest to a person for valuable consideration, and the purchaser will then step into the bankrupt's shoes with regard to it. The bankrupt would in that case remain the trustee of the property, but he would be a mere trustee having no longer any beneficial interest in the property. The question whether he should or should not be removed from his position of trustee is a matter concerning solely the cestui que trust. The trustee in bankruptcy has no interest in such a matter when he has ceased to hold any beneficial interest in the property.

A complication arises, however, when the trust property in question entails liabilities on the trustee, as, for instance, when it is in the form of a lease of which the bankrupt, as trustee, is possessed of the legal estate. These liabilities are none the less actual personal liabilities of the bankrupt because he has a right of indemnity. That indemnity may be insufficient, and then the primary liability becomes effective. By the operation of the bankruptcy the bankrupt is stripped alike of his property and his liabilities; and, inasmuch as the legal estate involves liabilities and carries with it a contingent beneficial interest in the shape of indemnity, the solution can no longer be found in allowing the legal estate to remain in the bankrupt. It must

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pass to the trustee, who will then hold the property on the same trusts as those on which the bankrupt previously held it (so far as concerns any cestui que trust other than the bankrupt himself) and will have the same rights of indemnity. He may then disclaim under the provisions of s. 55 of the Act of 1883, and in such case the Court would no doubt vest the legal estate in some other trustee, if any one were willing to take it, as would be the case if the lease were of value. But if the lease were of no value, or onerous, the consequence would be that the trustee in bankruptcy would obtain leave to disclaim if the cestui que trust did not come forward to relieve him of liability. The land might then have to go back to the lessor, who would have to prove against the estate in respect of the loss, i.e., the difference between the value of the estate thus coming back to him, and the covenants from which the bankrupt is released by bankruptcy.

This is the strict method of proceeding. But in cases where the right of indemnity is abundantly sufficient to cover the liability and the bankrupt has no beneficial interest as a cestui que trust, the parties may not care to go through this process, and it may be convenient to leave the matter wholly outside the bankruptcy, so that the bankrupt remains formally trustee. This, however, does not change matters. It is not necessary here to decide whether the proper view in such a case is that the bankrupt continues to hold the property merely as representing his trustee, in whom the legal interest is really vested by reason of the bankruptcy, or whether it should be taken that the legal estate passed to the trustee in bankruptcy, and that by consent of all parties he has passed it on to another trustee, i.e., the bankrupt himself. Bankruptcy does not disqualify a man from becoming a trustee. It is probable that the question whether the one or the other is the true interpretation may depend, in the case of trust funds, &c., on the conduct of the parties at the time. But in the case of a lease where leave must be obtained to disclaim, I have no doubt that the former is the true interpretation, and that the legal estate passes to the trustee just as in the case of any other lease to the bankrupt. Whether recognized or not by any formal act, the legal estate has passed out of the bankrupt

with all its liabilities and rights of indemnity, and the trustee in bankruptcy has taken his place.

It remains to apply the above to the special facts of the present case. [The Lord Justice stated the facts, and continued:—] It is admitted that if and so far as any interest passed to the trustee in bankruptcy it passed back to the defendant under the assignment of September, 1896, so that by virtue thereof he stands in the same position as the trustee with regard to the same.

What then was the position of the trustee with regard to it? I cannot myself feel any doubt on the subject. So far as his liabilities towards third parties were concerned, the agreement of sale to the wife of November 28, 1894, had no effect whatever. He remained, so far as they were concerned, simply the lessee under those leases. It is true that it had altered his beneficial interest in the property. It was now reduced to a right to indemnify himself against those liabilities. But this was an interest of substantial value, especially as it was probable that his purchaser would not be able to obtain for him freedom from being primarily liable in respect of the premises by obtaining the lessor's consent to a formal assignment. I have no doubt whatever, therefore, that the legal estate passed to the trustee in bankruptcy just as much as did the legal estate in the case of any other lease in which the bankrupt was the lessee. The trustee in bankruptcy could have applied to disclaim that lease in the ordinary way, and he probably would have done so had he known of the previous transaction, which it is admitted was concealed from him. But though the legal estate became vested in him, it carried with it only such beneficial estate as the bankrupt had at the date of the bankruptcy, i.e., a right of indemnity against the property so far as the cestui que trust did not keep him safeguarded from the liabilities.

Upon the execution of the assignment of September 30, 1896, all this passed from the trustee in bankruptcy to the defendant. The legal estate was vested in him, but he had only the same beneficial interest in the property that he had immediately previous to the bankruptcy. The effect of this is that the combined effect of the bankruptcy and the assignment was to leave

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matters precisely as they had been prior to the bankruptcy. The defendant is now the owner of the legal estate subject to all the liabilities which it entails, just as he had previously been, but these liabilities are not purged or even affected by the bankruptcy, because they arise out of the assignment that subsequently took place, and with which the bankruptcy has nothing to do.

Counsel for the defendant argued most strenuously that the defendant at the date of the bankruptcy was a bare trustee of the property for his wife. I decline to go into the question whether or not he was a bare trustee. The phrase does not occur in the Act, and there is a conflict of judicial opinion as to the proper signification. Under those circumstances I decline to use it. In such a case I prefer to deduce the legal consequences from the facts themselves, and not to make them depend on the doubtfully justified use of particular phrases.

Seeing, therefore, that the defendant was at the date of the writ the lessee under these leases, there is no defence to this action. The appeal must be allowed with costs, and judgment entered for the plaintiffs for the proper amount when ascertained, with costs of the hearing before Hamilton J. If there are any further proceedings to ascertain the actual amount due, the costs of these proceedings cannot be awarded now, but must await the result.

FARWELL L.J. It is unnecessary to restate the facts, which have been already stated.

In 1895 the defendant became bankrupt. At that date rent on the leases was in arrear, the whole of the mortgage to the building society had not been discharged, and there was a serious liability on the covenants to repair, especially on the covenant to yield up in repair at the end of the terms, which had then about twelve years only to run, and the covenant against assignment prevented the defendant from getting rid of the future liabilities under the leases by assignment. The position of the parties was this: the defendant was legally liable on the covenants and for the mortgage debt; his wife was liable to indemnify him against those liabilities; and the defendant was

also entitled as trustee to hold the demised premises of which he was trustee and the rents thereof as an indemnity. Lord Selborne says in *Stott* v. *Milne* (1): "The right of trustees to indemnity against all costs and expenses properly incurred by them in the execution of the trust is a first charge on all the trust property, both income and corpus. The trustees, therefore, had a right to retain the costs out of the income until provision could be made for raising them out of the corpus." The same rule, of course, applies to all trustees' liabilities properly incurred. Having regard to the shortness of the terms in this case, the magnitude of the liabilities, to the fact that the only cestui que trust was a married woman, and to the impossibility of assigning in order to escape liability, I am of opinion that the trustee was entitled to retain all the rents to form an indemnity fund, and also that he could have obtained relief by an action in the Chancery Division to enforce his indemnity: *Phené* v. *Gillan* (2); *In re Blundell* (3); *Hobbs* v. *Wayet*. (4) He was therefore in the position of a man under legal liabilities but with a right to indemnity secured by the legal estate and possession of the premises in respect of which such liabilities arose. It is therefore clear that he was bound to disclose both the liabilities and the security against the same in his bankruptcy. He, however, failed to perform his duty, and on September 30, 1896, the whole of the bankrupt's estate was duly sold to his wife and assigned to the defendant as a trustee for her. The plaintiffs now sue him on the covenants in the lease, and he pleads (1.) that these were liabilities provable in bankruptcy and that his discharge released him therefrom, and (2.) that the terms of years were held by him as a trustee and therefore did not pass to his trustee in bankruptcy, and so did not pass by the assignment of September, 1896. I agree with the first point. I think it plain that these were liabilities provable in the bankruptcy; but this very fact defeats the second point. The liabilities arise out of and are incident to the very property which the defendant alleges did not pass to his

(1) (1884) 25 Ch. D. 710, at p. 715.
(2) (1845) 5 Hare, 1.
(3) (1888) 40 Ch. D. 370, at pp. 376, 377.
(1887) 36 Ch. D. 256.

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trustee, but the possession of and legal estate in such property are necessary to give effect to the indemnity to which the trustee is entitled. It is impossible, while giving effect to the first contention, to shut one's eyes to the result ensuing in equity from that state of things. It is said that s. 44, sub-s. 1, shews that this cannot be so, because the property of the bankrupt does not include property held by the bankrupt on trust for any other person. But it does include property held by the bankrupt on any trust for his own benefit, and when, as here, he holds property to secure his own right of indemnity in priority to all claims of any cestui que trust, and the retention of such property is necessary to give full effect to such right, it follows that the property, i.e., the legal estate, and right to possession vest in the trustee in bankruptcy to the extent to which they were vested in the bankrupt. The law is stated by Jessel M.R. in *Morgan* v. *Swansea Urban Sanitary Authority* (1), where he says, "Under the Bankruptcy Act, where a trustee has no beneficial interest, the legal estate does not pass; but where he has it does pass," and (2), "Now the present case is that of an unpaid vendor. He is not bound to convey until he is paid the purchase-money. He has a charge or lien on the estate for the purchase-money." The true test is, Can the trustee be compelled to convey the estate to the cestui que trust? If he can, then it does not pass to his trustee in bankruptcy, but if he cannot, then the property does pass. It is clear that no Court would compel the trustee in a case like the present to divest himself of the estate and thereby deprive him of the security for the indemnity. This is in accordance with the passage in Littledale J.'s judgment in *Carvalho* v. *Burn* (3), already read by the Master of the Rolls. It is said that this will lead to inconvenience and disturbance in trust estates. I do not agree: there need not and would not be any practical difficulty if the bankrupt makes proper disclosure: if he had done so in this case, it would have been the duty of the trustee in bankruptcy to communicate with the lessors and the cestui que trust, and the whole matter would have been arranged without difficulty. The defence in this case is

(1) 9 Ch. D. 582, at p. 585. (2) Ibid. at p. 586.
(3) 4 B. & Ad. at p. 393.

dishonest and is not improved by the fact that its possibility has arisen from the defendant's own misconduct in failing to make full and proper disclosure in his bankruptcy.

I am of opinion that the plaintiffs are entitled to judgment with costs here and below.

Appeal allowed.

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Solicitors: *Pennington & Son; Brown & Woolnough.*

W. C. D.

[IN THE COURT OF APPEAL.]

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Factor—Mercantile Agent—Goods on Sale or Return—Authority to pledge—Factors Act, 1889 (52 & 53 *Vict. c.* 45), *ss.* 1 *and* 2.

The plaintiff, a manufacturing jeweller, was accustomed to send articles of jewellery to F., a retail jeweller, for sale on the terms of a letter written by F. to the plaintiff, in which F., after acknowledging that he had had from the plaintiff "on sale or return" the goods entered up to date in a book in the possession of the plaintiff, and that he was liable to account to the plaintiff for such goods, continued: "The goods referred to in that book mentioned are your property, and to remain so until sold or paid for, they being only left with me for the purpose of sale or return, and not be kept as my own stock. The goods I receive from you are to be entered at cost price, and my remuneration for selling them is agreed at one half the profit":—

Held, that upon the construction of the letter as a whole F. was employed as agent for sale; that he was a mercantile agent within the Factors Act, 1889, and as such had implied authority to pledge the goods entrusted to him; consequently that the plaintiff could not recover goods pledged by F. with the defendant without express authority from the plaintiff.

Weiner v. *Gill*, [1906] 2 K. B. 574, explained and distinguished.

Hastings, Limited v. *Pearson*, [1893] 1 Q. B. 62, overruled.

APPEAL from a decision of Pickford J.

The plaintiff was a manufacturing jeweller carrying on business in Hatton Garden, London.

The defendant was a money-lender and pawnbroker carrying on business in Cardiff.

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The action was brought for the recovery of certain articles of jewellery which had been pledged with the defendant by one Fisher as security for an advance to the latter.

About the end of 1904 or the beginning of 1905 Fisher, who had previously been employed as an assistant to a jeweller named Samuels, set up business on his own account, and he travelled about the country selling jewellery.

The plaintiff from time to time sent him articles of jewellery for sale upon the terms in each case of an approbation note containing the following heading:—"On approbation. On sale for cash only or return. From Samuel Weiner, diamond mounter and manufacturing jeweller. Goods had on approbation or on sale or return remain the property of Samuel Weiner until such goods are settled for or charged. The consignees are responsible for these goods until they are returned to my possession." The note specified the price of the articles.

Some months later Fisher, who in the meantime had opened a jeweller's shop in Harrogate, proposed a change in the terms upon which business should be conducted between him and the plaintiff, and ultimately the new terms of business were embodied in a letter written by Fisher to the plaintiff, dated July 31, 1905. That letter (omitting the formal parts) was as follows:

"I acknowledge I have had from you on sale or return the goods entered up to this date in the book labelled 'goods sold to Mr. Fisher,' which is in your possession, and which I have examined, and I admit that I have to account to you for such goods. The goods referred to in that book mentioned are your property, and to remain so until sold or paid for, they being only left with me for the purpose of sale or return, and not to be kept as my own stock. The goods I receive from you are to be entered at cost price, and my remuneration for selling them is agreed at one half of the profit; that is, I retain one half of the difference of the price at which I sell each article and the cost of it, and immediately I receive the price of any article sold I am to remit to you the cost price and one half of the profit as above. It is clearly understood that you have no interest in my business, and I have none in yours, and that no arrangement of any kind is existing or to exist between us, and that any

goods I may have at any time from you may be returned upon payment."

Thenceforward the course of business between the parties was regulated by this letter. The plaintiff, however, in sending goods to Fisher still continued to use the same form of approbation note, but the cost price of the goods was substituted for the price at which the goods were to be sold. It appeared that the plaintiff had entrusted to Fisher many thousand pounds' worth of goods on this footing.

The defendant by his defence alleged that the goods in question in this action had been pledged with him by Fisher with the express authority of the plaintiff, and alternatively that Fisher was a mercantile agent within s. 1, sub-s. 1, of the Factors Act, 1889, and as such had authority to pledge the goods, and that at the time when the goods were pledged the defendant had no notice of any disability on the part of Fisher to deal with them.

Pickford J. held upon the construction of the letter of July 31, 1905, that Fisher was not a mercantile agent entrusted with goods for the purpose of selling on behalf of the plaintiff within the meaning of the Factors Act, 1889, and had consequently no implied authority to pledge, and he found on the evidence that he had no express authority from the plaintiff. He therefore gave judgment for the plaintiff with costs.

The defendant appealed against this decision upon the question of law.

In a similar case of *Weiner* v. *Owen & Robinson, Ld.* (decided October 28, 1909; unreported) Bray J. arrived at the same conclusion upon the construction of the letter.

J. B. Matthews, for the appellant. Under the document of July 31, 1905, Fisher was an agent for sale. He was therefore a mercantile agent under the Factors Act, 1889. The course of business was that Fisher was allowed to sell and did sell Weiner's goods on credit. The appellant knew Fisher and took the goods in good faith. A mercantile agent with authority to sell has authority to pledge.

The learned judge in the Court below failed to distinguish between the Factors Act and the Sale of Goods Act, upon s. 18 of

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which *Weiner* v. *Gill* (1) was decided. When dealing with the question of sale or return under s. 18 the section contemplates the case of a buyer. Under the Factors Act it is never contemplated that the agent shall be the buyer, but that he shall sell to some one else.

[FLETCHER MOULTON L.J. I do not think *Weiner* v. *Gill* (1) has anything to do with this case.]

The first statutory use of the expression "mercantile agent" occurs in the Factors Act, 1889. It had been previously used by the judges. The test formerly was whether he was an agent entrusted with the possession of goods: *Heyman* v. *Flewker*. (2) The operation of the Factors Act has not been restricted.

[FLETCHER MOULTON L.J. The effect of the Act of 1889 is that a man who has been entrusted with the power of sale is given the lesser power of pledging.]

Yes; the Legislature adopted in the Act what the judges had before held.

In *Hastings, Limited* v. *Pearson* (3) it was held that a man who was employed by a firm of jewellers at a small salary to sell goods for them, retail, on commission, was not a mercantile agent within the Act; but that case is very different from this.

[FLETCHER MOULTON L.J. referred to the remarks of Blackburn J. in *Lamb* v. *Attenborough*. (4)]

Wood v. *Rowcliffe* (5) is to the same effect.

In *Oppenheimer* v. *Attenborough & Son* (6) it was held that the authority given by s. 2 of the Act of 1889 to a mercantile agent who is in possession of goods with the consent of the owner to pledge the goods is a general authority and not restricted by the existence of a trade custom to the contrary: *Hastings, Limited* v. *Pearson* (3) was distinguished in *Tremoille* v. *Christie*. (7)

Rawlinson, K.C., and *H. Dobb* (with them *Reginald White*), for the respondent. In this case the goods were entrusted to Fisher as an independent contracting party and not as a mercantile agent. If there be a doubt upon the construction of the document

(1) [1905] 2 K. B. 172; [1906] 2 K. B. 574.
(2) (1863) 13 C. B. (N.S.) 519.
(3) [1893] 1 Q. B. 62.
(4) (1862) 31 L. J. (Q.B.) 41.
(5) (1846) 6 Hare, 183, at p. 191.
(6) [1908] 1 K. B. 221.
(7) (1893) 69 L. T. 338.

the surrounding circumstances should be considered. In the course of the business between the parties Fisher had to pay for half the insurance of the goods. There is no evidence that he ever acted or was intended to act as a mercantile agent. For the Factors Act to apply it must be shewn that he was "an agent entrusted with the possession" in this particular transaction: *Cole* v. *North Western Bank.* (1) The principle of *Weiner* v. *Gill* (2) applies to this case. Assuming that Fisher was an agent, he was not a mercantile agent, because this was not his customary and regular business. His business was that of a retail jeweller at Harrogate.

[FARWELL L.J. referred to the judicial definitions of mercantile agent in *Oppenheimer* v. *Attenborough & Son.* (3)]

J. B. Matthews, in reply. This is an ingenious attempt to evade by indirect means the provisions of the Factors Act and it ought not to succeed.

COZENS-HARDY M.R. This appeal raises a question which is undoubtedly one of some difficulty, because the document upon which everything depends has been construed by two learned judges, for whom I have the most profound respect, in a manner which I am unable to adopt. [The Master of the Rolls stated the facts, and continued:—] The only point which arises for consideration before us is what is the meaning and legal effect of a letter of July 31, 1905, upon the faith of which the business relations between the parties were carried on? That involves, before I read the letter, this important consideration: Was the transaction the ordinary well-known transaction of goods taken on sale or return, or was it a transaction under which Fisher was constituted agent for sale, with authority to sell, and bound to account to his principal for the proceeds of such sale? If it was the former, it is quite plain that the property never has passed from the plaintiff Weiner, and that Weiner is entitled to recover it; the Factors Act is altogether out of the question and does not require any consideration from us. If it was the latter, the Sale of Goods Act is equally out of the question, and we have

(1) (1875) L. R. 10 C. P. 354, at p. 375.
(2) [1905] 2 K. B. 172; [1906] 2 K. B. 574.
(3) [1908] 1 K. B. 221.

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only to consider what is the true meaning and effect of one or two sections of the Factors Act as between the plaintiff and the defendant. In my opinion this is not a transaction in which goods are sent on sale or return. It is quite plain that by the mere use of a well-known legal phrase you cannot constitute a transaction that which you attempt to describe by that phrase. Perhaps the commonest instance of all, which has come before the Courts in many phases, is this: Two parties enter into a transaction and say "It is hereby declared there is no partnership between us." The Court pays no regard to that. The Court looks at the transaction and says "Is this, in point of law, really a partnership? It is not in the least conclusive that the parties have used a term or language intended to indicate that the transaction is not that which in law it is." So here the mere fact that goods are said to be taken on sale or return is not in any way conclusive of the real nature of the contract. You must look at the thing as a whole and see whether that is the real meaning and effect of it. [The Master of the Rolls read the letter of July 31, 1905, and continued:—] In my opinion it is impossible to say, on the fair construction of that letter, that the parties ever contemplated or intended that Fisher should be the purchaser of the goods, because on the very terms of it the price could not be ascertained until after he resold them, and he was not to put them in his stock. In the ordinary transaction of purchase and sale, directly one party to the contract says "I will not return, I will elect to take the goods," he becomes the buyer. This is plainly, as it seems to me, a transaction in which Fisher had no right to buy. Fisher only had a duty towards Weiner to sell, and he was to be remunerated for his services in selling the goods by half the excess of the cost price; no more. It is all the more extraordinary because he was not even accountable to Weiner for the so-called purchase price, that is to say, the cost price plus half the sale price, until he actually received the money from the buyer. I ought not to say "the ultimate buyer," because I do not consider that Fisher was a buyer at all. Take another instance: you never hear in an ordinary transaction of sale and return that the goods are only left with the man for the purposes of sale or return and

not to be kept in his own stock. Then there was the phrase, although I do not attach too much importance to it, of accounting for the goods used in a simple transaction of sale and return. I have come unhesitatingly to the conclusion that this was a transaction in which Fisher was not and could not become the buyer of the goods, but a transaction in which Fisher was employed solely as agent, and as agent was to be remunerated by a certain percentage; and the very fact that he was to be remunerated for his services is alone, I think, almost sufficient to shew that he could not be a buyer, because it is quite plain that no person who is an agent, or is to be remunerated as agent, can be allowed to buy that which he is instructed and authorized to sell. Then it is said that even if this is not an ordinary transaction of sale or return—even if it did constitute Fisher agent—still this case is not within the Factors Act. It is necessary for that purpose to refer only to ss. 1 and 2. Sect. 1, sub-s. 1, says "For the purposes of this Act the expression 'mercantile agent' shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods"—that is the only part which is material. Then s. 2, sub-s. 1, says this: "Where a mercantile agent is, with the consent of the owner, in possession of goods or of documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall . . . . be valid." Apply that first section. Many thousand pounds' worth of goods were handed over by Weiner to be dealt with on the footing of this letter. I am bound to say I cannot imagine a mercantile agent within the meaning of this section if Fisher was not. He was sent all over the country by Weiner for the very purpose of disposing of the goods upon the footing of the letter, and to say that his business was that of a shopkeeper is altogether irrelevant to any question we have to decide here. We were referred to three definitions of the term "mercantile agent" given by three judges of the Court of Appeal in *Oppenheimer* v. *Attenborough & Son.* (1) They are not precisely the same, but every one of them is couched in such language as

(1) [1908] 1 K. B. 221.

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plainly covers the position of Fisher, and, even apart from that authority, I should have had no doubt that Fisher was, within the meaning of the definition in the Factors Act, a mercantile agent. The only authority which throws any doubt upon the matter is *Hastings, Limited* v. *Pearson.* (1) There the plaintiffs, a firm of jewellers, employed Brooke at a small salary to sell goods for them, retail, on commission. He pawned the goods. It was held by the Divisional Court that Brooke was not a mercantile agent within the meaning of the Act on the ground apparently that the Act "applies only to persons of the class ordinarily carrying on the business of mercantile agents, and that it has no reference to a man in such a position as Brooke was. There is no such business as that of an agent to pledge with pawnbrokers small articles of jewellery for the purpose of raising money for the employer of the agent." I think it is quite clear that the Lord Chief Justice in *Oppenheimer* v. *Attenborough & Son* (2) indicated in no doubtful language that he did not altogether approve of that case. In my opinion that case ought not to be treated as good law, and it really was not relied upon by counsel for the respondent in support of the decision of the Court below. In my opinion it ought not to stand in our way or prevent us from saying that the defendant, having regard to the provisions of the Factors Act, has a perfectly good title to this pledge. I think that this appeal should be allowed.

FLETCHER MOULTON L.J. I am of the same opinion. The question depends entirely upon the interpretation of the letter of July 31, 1905, from Fisher to the plaintiff. The only difficulty in construing that letter arises from the use of the words "sale or return." I fully agree with what the Master of the Rolls has said, that no phrase can enable a person to misdescribe a contract, that you must look at what the contract is and not at what the parties say it is. Of course in ascertaining the contract you must give weight to all the phrases in the letter, but it is upon the whole letter that you have to decide what the contract is. The Master of the Rolls has cited the instance of people saying there shall be no partnership. We put that on one side and consider

(1) [1893] 1 Q. B. 62. (2) [1908] 2 K. B. 221.

whether that which is established is or is not a partnership. We are not ruled by the words disclaiming the existence of a partnership. Another common instance—one very well known to those who practise on the common law side of the Courts—is where in a contract certain fixed damages are declared to be liquidated damages and not a penalty. It is for the Court to decide whether the sum named is in fact liquidated damages or penalty. The ordinary case of the use of the words "sale or return" is when the goods are entrusted to the prospective buyer on sale or return, and there it means sale to him. He is either to be the buyer or he is to return them. But so far as the literal meaning of the words is concerned they are applicable to a case where a man says "I have delivered these goods to my selling agent on sale or return, that is to say, he is either to sell them, or, if he does not sell them, he is to return them, but he is not intended to buy them." In my opinion this letter uses "sale or return" in the latter sense. It obviously refers to a sale by Fisher and not a sale to Fisher. If you read the whole of the letter you will find the words "sale," "sell," and "selling" used more than once, and in every case they clearly refer to a sale by Fisher. Under these circumstances, reading the phrase "sale or return" with the context, I am satisfied that "sale" there meant sale by Fisher and not sale to Fisher. The letter has been fully examined by the Master of the Rolls, and therefore I need not go further into it. The use of such phrases as "the goods I admit are your property and to remain so," "my remuneration for selling the goods," "the price at which I sell," and "immediately I receive the price of any article sold" shews conclusively that the sale is a sale in which Fisher officiates as a seller, arranging a price with the buyer. If we look closely at the course of business we find that, so far from Fisher having the right to take at the price at which the goods were sent to him (which is essential to a case where the goods are delivered to the buyer on sale or return in the ordinary sense of the term) he was obliged to pay a small profit if he wanted to take them. It was never contemplated by the parties to the arrangement that Fisher should be the buyer. Therefore, in my opinion, Fisher is simply an agent for sale.

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A most extraordinary argument has been addressed to us upon the Factors Act, 1889. It is suggested that a man who has a stock for sale is not a mercantile agent within the meaning of that Act. I wholly disagree with this. Fisher, if the goods were consigned to him as agent for sale, was, if ever man was, a mercantile agent within the meaning of the Factors Act. I agree that this is inconsistent with the decision of the Divisional Court in *Hastings, Limited* v. *Pearson* (1), but in my opinion that decision is not good law, and the case must be considered as overruled. For these reasons I think that the appeal should be allowed.

FARWELL L.J. I so entirely agree with the judgments of my brethren that I have very few words to add. It is true that "sale or return" are technical words, but they are only so when used in reference to a buyer, and if, on the true reading of this letter, there is no buyer, no particular importance can be attached to them as having a technical meaning. The question really turns on the construction of the letter, in the second paragraph of which the phrase "they being only left with me for the purposes of sale or return and not to be kept as my own stock" clearly excludes the idea of Fisher being a buyer; he is not to buy in any event, but is to sell for or on behalf of Weiner or return. Then he was to have a remuneration for selling: this is consistent with his being agent for sale, but quite inconsistent with his being owner: an owner is not remunerated for selling his own goods. The argument on behalf of the plaintiff is founded on a misreading of *Weiner* v. *Gill* (2), a case which really has no bearing on the present. In that case there was a buyer and the goods were sent on sale or return to that buyer, but the operation of the Act was excluded by the express provision that the property was not to pass until the goods were paid for: he had possession of but not the property in the goods; it was only if and when the goods were paid for that the property passed to him. In this case the property never passes at all to Fisher. He simply receives the goods as Weiner's agent for the purpose of sale by him on Weiner's account or return by him, and

(1) [1893] 1 Q. B. 62. (2) 1906] 2 K. B. 574.

not to be kept by him as his own property. That disposes of the case; but I would add (as Mr. Weiner appears to rely upon the form of the document in *Weiner* v. *Gill*(1)) that I do not think that there is any mode by which the Factors Act can be used to evade the law of estoppel by enabling the owner of goods to invest another with the apparent property in and possession of them for the purpose of selling them on behalf of the owner without taking the risk of such person's honesty. The Act does not enable an owner of goods to insure the honesty of his own agent for sale at the expense of the public to whom such goods are offered. There are, of course, different sorts of dealing on sale or return. If a tradesman sends me goods on sale or return he intends that I shall buy them myself, not that I shall sell them either for him or for myself so as to enable me to pay him. But if he sends them to a retail dealer or the like on sale or return for the purpose of his selling them to other people as if they were his own goods, I think that the ordinary doctrine of holding out would apply. I agree with my brethren that *Hastings, Limited* v. *Pearson* (2) cannot be considered good law and must be overruled.

Appeal allowed.

Solicitors for appellant: *Davenport, Cunliffe & Blake, for Yorath & Jones, Cardiff.*

Solicitor for respondent: *Julius A. White.*

(1) [1906] 2 K. B. 574.

(2) [1893] 1 Q. B. 62.

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[IN THE COURT OF APPEAL.]

HOLWELL IRON COMPANY, LIMITED *v.* MIDLAND RAILWAY COMPANY.

Railway—Rates—Traffic Management — Difference in Treatment — Undue Preference—Purchase of Land—Special Agreement—Adequate Consideration—Payment in Cash and Services—Railway and Canal Traffic Act, 1854 (17 & 18 *Vict. c.* 31), *s.* 2—*Railway and Canal Traffic Act*, 1888 (51 & 52 *Vict. c.* 25), *s.* 27, *sub-ss.* 1, 2.

A "difference in treatment" within the meaning of sub-s. 1 of s. 27 of the Railway and Canal Traffic Act, 1888, between rival traders by a railway company may be justified and explained by an agreement bona fide entered into by the railway company and a trader under which land is taken and arrangements are made for what is to be done on and with reference to the land so taken.

An agreement of purchase made in good faith between a railway company and a trader, whereby the latter receives payment partly in cash and partly in services to be rendered by the railway company on land the subject-matter of the agreement at rates lower than those charged to other traders, is not bad in law as against public policy.

Per Fletcher Moulton L.J.: Agreements for the acquisition of land are not rendered invalid by containing, as part of the consideration from the railway company, stipulations as to easements and services over the land so acquired.

Decision of the Railway and Canal Commissioners, [1909] 1 K. B. 486, affirmed.

Appeal from a decision of the Railway and Canal Commissioners (1) which raised the question whether the applicants were entitled as against the Midland Railway Company to relief in respect of an alleged undue preference given by the railway company to the Staveley Iron and Coal Company, Limited, competitors in business with the applicants, who were iron smelters and iron founders and manufacturers of other articles enumerated in class C of the "merchandise traffic" of the railway company's rates and charges.

The facts and the agreement of November, 1866, are given in greater detail in the report of the case in the Court below, and the following shortened statement is considered sufficient for the purposes of this report.

(1) [1909] 1 K. B. 486.

The applicants complained that the Staveley Company were unduly preferred by the defendants in the following respects:— (1.) That the defendants did all the terminal services and provided all the terminal accommodation at the Staveley Company's works free of charge; (2.) that they hauled all the inward traffic from their main line to the Staveley Company's works and did the internal shunting at a low fixed rate of $1\frac{1}{4}d.$ per ton, and carried the outward traffic from the works to the main line at a fixed charge of 1*d.* per ton, which charges were lower than those laid upon the applicants in respect of their traffic; (3.) that for coal and coke brought to the Staveley Company's works from certain named collieries a lower mileage rate per ton was charged than in the case of coal brought to the applicants' works; (4.) that these rates, as was admitted, were after the year 1900 increased to the applicants, but not to the Staveley Company.

As a justification of the matters complained of the defendants pleaded that, being empowered in 1865 by one of their private Acts to acquire by compulsion or agreement certain private railways and sidings of the Staveley Company, they entered into an agreement with them in November, 1866, for the purchase of these railways and sidings, engines and tenders, on certain terms which, so far as material, were as follows:

Article 1. "The vendors (the Staveley Company) agree to sell and the purchasers (the Midland Railway Company) agree to purchase first All the estate term and interest of the vendors of and in all such and so many of the several pieces of land hereinbefore described as are enclosed and used for the purposes of the several railways and sidings and of and in the several rails chairs sleepers and other accessories thereto belonging situate at Staveley respectively hereinbefore referred to all which railways and sidings are delineated on the plans hereunto annexed and are specified in the first schedule hereunder written Secondly All the estate term and interest of the vendors in all such and so many of the several pieces of land hereinbefore described and delineated on the plans hereunto annexed as are specified in the second schedule hereunder written and Thirdly All those locomotive engines and tenders and the fittings machinery and things thereto belonging and which are now worked and used

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upon the railways sidings and premises hereinbefore mentioned for the purposes of the Staveley Company's businesses which engines are specified in the third schedule hereunder written together with the rights members and appurtenances to the several premises belonging or appertaining," subject to certain ground rents and other sums of money for or in respect of way-leaves or other easements theretofore paid by the vendors.

Article 2. "The consideration money for the purchase shall be 29,788*l.* 14*s.* to be paid by the purchasers to the vendors as hereinafter expressed."

Article 8. "On payment of the purchase-money of 29,788*l.* 14*s.* the vendors will give to the purchasers full and quiet possession of the purchased railway sidings and other roads and ways and other the premises hereinbefore particularly mentioned and will deliver to them the purchased engines and tenders with the appurtenances and all outgoings down to the day of such payment except where otherwise provided shall be cleared by the vendors."

Article 12. "The purchasers will from time to time do and perform all the locomotive shunting operations upon the several branches and sidings in the parish of Staveley belonging to the vendors and purchasers respectively and will efficiently work the whole of the traffic of or connected with the vendors' businesses in like manner and with the like facilities in all respects as the same has heretofore been performed by the vendors they nevertheless continuing to find and provide horse power to the like extent as they have hitherto done but not further or otherwise."

Article 13. "The purchasers will at their own expense so long as the vendors require continue to work and run the trains hitherto used for conveying colliers both ways between Staveley and Chesterfield including the taking of the colliers to the coal-pits at and for the like charges as have hitherto been paid by the vendors to the purchasers namely the charge of one penny a day for every collier."

Article 14. "The vendors will for the carriage of all minerals or other goods traffic upon the several railways hereby agreed to be purchased (including the new curve provided for by article 11) or upon the vendors' branches or sidings into their works except those of the old Hollinwood Colliery pay to the purchasers at

the rate of one penny farthing a ton for every journey, a journey being considered to be from any point on the railways agreed to be purchased to any other point on the railways branches or sidings where the vendors require the materials to be delivered. Provided that the purchasers will not at any time charge any higher rate or make any other charge or toll to the vendors for the use of the railways agreed to be purchased than the purchasers from time to time make to other parties sending goods or traffic over those railways."

Article 15. "The vendors will pay to the purchasers one penny a ton and no more for working the coal traffic from the old Hollinwood Colliery to the main line at the Staveley Station and all castings and manufactured goods and all materials sent from the Staveley Iron Works shall be carried by the purchasers to their main line at the Staveley Station at the same rate and the vendors will maintain and keep in repair the lines of railway belonging to them in connection with the old Hollinwood Colliery as their property so long as they require the use of those lines of railway."

Article 16. "All goods and materials of all descriptions carried by the purchasers for the vendors shall be delivered into the works of the vendors without any terminal charge whatsoever for the delivery thereof and with the like facilities as such goods and materials have hitherto been delivered."

Article 19. "The several provisions and agreements hereinbefore contained so far as the same relate to the future working of the vendors' traffic upon the lines of railway hereby agreed to be purchased and all rights and privileges tonnage rates and other the conveniences and advantages hereinbefore provided for shall continue and be in force so long as the vendors or their successors carry on the business in which the Staveley Company are now engaged or any business of a similar character and notwithstanding the expiration of the leases or agreements hereinbefore recited or any of them and whether the same or any of them be hereafter renewed or extended or not and on the Staveley Company or their successors ceasing so to carry on business those provisions and agreements shall be void."

The applicants also complained of certain rebates allowed by

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the defendants to other rival traders, but these matters were not argued on this appeal, when the applicants' case rested mainly on the agreement of 1866.

The Commissioners came to the conclusion that, as the agreement was good, the rates charged were justified, and that there was no undue preference, and, further, that upon the evidence the applicants were not entitled to damages.

The applicants appealed.

Balfour Browne, K.C., *Foote*, K.C., and *E. Clements*, for the appellants. The agreement of 1866 is bad in law and contrary to the whole scheme of the Railway Traffic Acts, and it expressly contravenes s. 2 of the Railway and Canal Traffic Act, 1854. The difference of treatment complained of is that services are rendered by the defendants to the Staveley Company on the lines and sidings in and adjacent to their works, either gratuitously or at charges substantially less than those which the appellants have to pay for the like haulage on the railway sidings adjacent to their own works. It is impossible for any trader to find out whether the consideration for the work done for the Staveley Company is adequate or not. Such an arrangement is ultra vires, for it includes special terms which but for the agreement would have been paid by tolls. Further, a railway company cannot perform gratuitous services as a consideration for land sold to them, and it cannot bargain to pay a consideration like this in future services. An agreement of this nature was held to be no justification to a complaint under s. 2 of the Railway and Canal Traffic Act, 1854, in *Rishton Local Board* v. *Lancashire and Yorkshire Ry. Co.* (1), *Pickering Phipps* v. *London and North Western Ry. Co.* (2), and *Charrington, Sells, Dale & Co.* v. *Midland Ry. Co.* (3)

The appellants have only to shew that there is a "difference in treatment" between them and the Staveley Company, and then the onus is by s. 27, sub-s. 1, of the Railway and Canal Traffic Act, 1888, thrown on the defendants to shew that there is no undue preference.

(1) (1893) 8 Ry. & Ca. Tr. Cas. 74.
(2) (1892) 8 Ry. & Ca. Tr. Cas. 83.
(3) (1901) 11 Ry. & Ca. Tr. Cas. 222.

The whole scheme of these Railway Traffic Acts is charging by tolls or rates, which are published so that all can see, and depending upon distance, weight, and quantity carried: *Midland Ry. Co.* v. *Great Western Ry. Co.* (1); *Simpson* v. *Denison.* (2) The provisions as to publication of rates and tolls also indicate the intention of the Legislature that competing traders may all see that they are being charged at the same rate as their rivals. The agreement, therefore, is one which the Commissioners cannot look at, because it is illegal and void. But assuming it can be looked at, then it is not adequate to prevent the admitted differences of treatment being an undue preference.

Sir Alfred Cripps, K.C., C. A. Russell, K.C., and *H. F. Bidder,* for the defendants. *Rishton Local Board* v. *Lancashire and Yorkshire Ry. Co.* (3), relied on by the appellants, is distinguishable; in that case the agreement sought to create a monopoly and was a violation of the conception of a railway as a public highway. No authority has been cited to shew that an agreement of this kind to render services is void. It seems to follow from *Fairweather & Co.* v. *Corporation of York* (4) and *Huntingdon* v. *Lancashire and Yorkshire Ry. Co.* (5) that a bona fide agreement with one trader may justify an inequality in rates between one trader and another. The defendants only acquired this land on the terms of rendering the services in question gratuitously or at the rates now complained of, and they are justified, by circumstances which do not exist in the case of the applicants, in treating the Staveley Company in the way they are treated. The Commissioners, therefore, were entitled to look at this agreement, which was a valid agreement, and see if it afforded a justification for the difference in treatment alleged, and this is a question of fact upon which there is no appeal: *Pickering Phipps* v. *London and North Western Ry. Co.* (6) Undue preference must be a question of fact. The Commissioners have considered this agreement and find that it justifies what the defendants have done.

(1) (1873) L. R. 8 Ch. 841, 853.
(2) (1852) 10 Hare, 51.
(3) 8 Ry. & Ca. Tr. Cas. 74.
(4) (1900) 11 Ry. & Ca. Tr. Cas. 201.
(5) (1901) 11 Ry. & Ca. Tr. Cas. 237.
(6) 8 Ry. & Ca. Tr. Cas. 83, at p. 96.

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Balfour Browne, K.C., in reply. The question whether the agreement is valid or not is a question of law. Any services rendered, whether on or off the line, are within the Railway Traffic Acts. The question of service off the line was considered in *Diphwys Casson Slate Co.* v. *Festiniog Ry. Co.* (1) These rates and tolls are created by statute, and the onus is on the defendants to shew that they treat the applicants fairly and that there was adequate consideration for this agreement. A difference in treatment has plainly been proved, for which the applicants are entitled to relief. [*Lever Brothers, Ld.* v. *Midland Ry. Co.* (2) was also cited.]

Cur. adv. vult.

Nov. 29. COZENS-HARDY M.R. This is an appeal from the decision of the Railway Commissioners, and it raises the question whether the applicants are entitled, as against the Midland Railway Company, to relief in respect of undue preference given by the railway company to the Staveley Company. In substance the applicants' case rests upon this one point. They have to do the haulage over several miles of lines within their own property, whereas the railway company do similar work for the Staveley Company either gratuitously or at a very reduced rate. Now I think it is plain that there is a "difference in treatment" within the meaning of s. 27, sub-s. 1, of the Act of 1888, and, unless something can be alleged by the railway company to explain and to justify this difference in treatment, the applicants must succeed.

The railway company meet this case by referring to an agreement made in 1866 between the Staveley Company and the railway company, which it is necessary to consider with some care. The railway company wanted to acquire a strip of land running right through the property of the Staveley Company on which a private line was laid, and also other lines of the Staveley Company. It was obvious that the claim for severance would be enormous unless provision was made for conveying coal and iron and other materials from the portion of the company's property on one side of the line to the portion on the other side of the

(1) (1874) 2 Ry. & Ca. Tr. Cas. 73. (2) (1909) 25 Times L. R. 768.

line, and also for conveying goods from both portions of the company's property to the railway line. Accordingly in 1865 the railway company obtained statutory power to purchase, by compulsion or agreement, certain railways in the parish of Staveley. This statute was followed by an agreement of November 29, 1866, by which the Staveley Company agreed to sell and the railway company agreed to purchase the land and railways in question, and also all the locomotives, engines, &c., belonging to and then worked and used upon the railways for the purposes of the company's businesses. The cash consideration was 29,788*l*. By article 12 the railway company agreed to do and perform all the locomotive shunting operations upon the several branches and sidings in the parish of Staveley belonging to the Staveley Company and the railway company respectively, and to efficiently work the whole of the traffic of or connected with the Staveley Company's business in like manner and with the like facilities in all respects as the same had theretofore been performed by the Staveley Company, they nevertheless continuing to find and provide horse power to the like extent as they had hitherto done, but not further or otherwise. By article 13 the railway company were to continue to run trains for conveying colliers between Staveley and Chesterfield at the old charges, and by article 14 the Staveley Company agreed to pay for the carriage of all goods traffic upon the several railways thereby agreed to be purchased at the rate of 1¼*d*. per ton, with a proviso that this sum should be reduced if a lower rate were charged to other parties. The purchase was completed. It has been acted upon for forty-three years. The main line of the Midland Railway Company runs through the works upon the purchased land. It is manifest that the cash payment of 29,788*l*. was not the sole consideration for the agreement. It is not questioned that the arrangement was made in good faith by people thoroughly competent to make fair bargains, and I see no reason to doubt that the bargain was reasonable and fair.

It is, however, argued by the appellants that the agreement is bad in law as against public policy, and that, even if not bad on that ground between the parties, it is nevertheless one which does not justify the railway company in granting exceptional

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terms to the Staveley Company to the prejudice of the appellants, who are rival traders in the immediate neighbourhood.

But is the agreement a void or illegal agreement? It only provides for certain services to be rendered by the railway company on land the subject-matter of the agreement. It in no way resembles an agreement to purchase goods in return for future gratuitous services to be rendered by the purchaser to the vendor. In substance it is no more than an agreement that the railway company would do on the purchased railways work of that nature which the Staveley Company had before done for themselves and which must have been provided for in some such way unless the cash compensation had been largely increased. There would have been no objection to a conveyance by the Staveley Company to the railway company of the land purchased subject to a rent-charge varying with the amount of tonnage carried by the railway company for the Staveley Company over the purchased lines, and this in substance is what the agreement amounted to.

I therefore am unable to say that there is anything in the agreement which makes it illegal or void at law. It follows, therefore, that the Railway Commissioners were entitled, and indeed bound, to look at and consider the agreement. It is a circumstance which might justify a difference of treatment and negative the charge of undue preference. If, as I hold, the agreement was valid inter partes, I fail to see what advantage could accrue to the appellants if the railway company were ordered to raise the rates or tolls to the Holwell level. For the railway company would be liable to pay damages to the Staveley Company for breach of contract, and the measure of those damages would be the amount of the increased rates or tolls. Of course a set-off would be arranged, and the result, so far as both the Staveley Company and the railway company are concerned, would be precisely the same as if there had been no change. This again is a circumstance which the Railway Commissioners were fully entitled to take into consideration, as justifying a difference of treatment and negativing the charge of undue preference. This is, however, a question of fact for the Commissioners and is not open to appeal. It is not for me to consider

whether I should have arrived at this conclusion of fact, though I must not be taken to indicate any different view.

In short, it seems to me that the only question of law open to the appellants is that the agreement is one which the Commissioners cannot look at because it is illegal and void, and that when once this point of law is decided against the appellants there is nothing else for this tribunal to deal with.

Before parting with the case I wish to add that I entirely agree with the arguments addressed to us by counsel for the appellants, that the general railway legislation contemplates definite rates or tolls depending upon distance and weight and to be published so that all traders may know exactly what all their rivals are being charged. Nothing that I have said is intended to apply except to a case where land is taken and arrangements are made for what is to be done on and with reference to the land so taken. In my opinion this appeal fails and must be dismissed with costs.

FLETCHER MOULTON L.J. I am of the same opinion. The procedure prescribed by statute to prevent railways treating certain traders with partiality to the injury of their competitors is very simple and effective. Starting from the fundamental proposition that all traders should be treated alike, it enacts that, if a trader can establish before the proper tribunal that there is a difference of treatment on the part of the railway company of himself and any other trader, it is for the railway company to shew that such difference of treatment does not constitute an undue preference. In the present case a difference of treatment is admitted. The question before us is whether the railway company have established that it is not an undue preference. They may do this by shewing that in reality it is not a preference at all, in which case it follows that it cannot be an undue preference, or they may shew that there are circumstances which justify the difference in treatment and render it fair and right.

The difference of treatment here complained of is that services are rendered by the railway company to the Staveley Company on the lines and sidings in and adjacent to their works either gratuitously or at charges substantially less than those which

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the complainants have to pay for like haulage on the railway sidings adjacent to their own works. The railway company reply that the Staveley Company originally possessed the land upon which those services are rendered, and that the railway company acquired it only on the terms of rendering the services in question gratuitously or at the rates complained of, and that, therefore, they are justified and required by law to treat the Staveley Company in this way by reason of circumstances which do not exist in the case of the complainants. The acknowledged difference of treatment is therefore, they contend, no undue preference. The complainants' answer to this is twofold. In the first place they say that the alleged agreement is a nullity by reason of its being ultra vires, and in the second place they say that, even if it be valid, it is not adequate to prevent the admitted difference of treatment being an undue preference.

The first of these two contentions raises a point of law of great general importance. The facts are as follows. The Staveley Company has carried on for many years past a very large iron business, mainly in the manufacture of iron pipes. For the purposes of its business it requires large quantities of coal, which it raises from collieries belonging to it in the immediate vicinity. Prior to 1866, when the railway company came on the scene, the Staveley Company owned the land situated between these collieries and their works, and the coal was brought from the collieries to the works on railways situated on their own land and belonging to them. The railway company desired and obtained from Parliament powers to acquire, for the purpose of constructing a through line, a strip of land lying between the works and these collieries. The effect of such acquisition would be to sever the collieries from the works. It is not necessary to point out how serious an interference this would be with the power of economical production by the Staveley Company. The services which the Staveley Company performed for itself in connection with its supply of coal would, if the land were acquired in the ordinary way by compulsory purchase, be in future performed by the railway company at railway rates. The more the business of the Staveley Company grew, the heavier would be the loss thus caused, and, seeing

that the Staveley Company would be entitled to be compensated once for all in respect of all loss by severance, &c., so as to place it in as good a position as if it had not been interfered with, it is evident that a very large claim for damage by severance could justifiably have been put forward, and it would have been very difficult for the railway company successfully to resist it.

Under these circumstances the parties came to an agreement, and the land was acquired by the railway company on the basis of obviating wholly or substantially the damage from severance in lieu of compensating for it. Broadly speaking, the lines of this part of the agreement were that the railway company should perform all the haulage over the acquired land which otherwise would have been performed by the Staveley Company in the course of their business, and should charge for it at a fixed rate, which no doubt was intended to be an equivalent for what would be the cost of such haulage to the Staveley Company if they performed it themselves. It is not necessary to examine in detail the provisions of the agreement. It was evidently come to bona fide, each party trying to get the best terms it could, and, seeing that the railway company had in reserve the power of taking the property compulsorily on arbitration terms, paying in cash for the severance claim, it is evident that they were not at any disadvantage in the bargaining. To my mind it was for both parties a wise type of agreement under the special circumstances of the case. The Staveley Company protected their economic working from injury, and the railway company gave them so much in the way of services as sufficed to effect this, and thereby escaped the risk of an exaggerated estimate of the loss which their acquisition of the land would cause to the Staveley Company. Unless, therefore, this type of contract is ultra vires on the part of the railway company, there is no fault to be found with the contract, and it is certainly for the appellants to shew that it is so, as there is nothing on the face of the contract which shews it to be illegal or void.

The appellants accept this onus. They maintain that any such arrangement is ultra vires which includes special terms relating to any matter which but for the agreement would in

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after times be the subject of tolls on the railway. In my opinion, the contention which they put forward obliged them to go as far as this. They based it on the general statutory provisions of the Railway Acts as to charging tolls and publishing the rates charged. I cannot see that there is any implied prohibition of all such agreements in the sections cited by them, and there is certainly no express prohibition. I think one might go further and say that the existence of any such prohibition would inflict unnecessary hardship both on the railway company and on vendors of land to it. Take for example a case such as the present, in which the railway propose to cut across an important line of communication between distant parts of the vendors' works. It is quite possible that the damage by severance might be substantially if not entirely obviated by giving to the vendors the right (at such times and on such conditions as would not interfere with the working of the railway) to pass over so much of the railway as was necessary to carry on the same traffic as had up to that time been carried on as internal traffic of their works. That they should be allowed to do so gratis for the purpose of lessening the injury arising from severance is most reasonable and quite in accordance with the practice of the Legislature in like cases, as, for instance, in permitting accommodation works being made for a like purpose. I should therefore be very slow to decide that such an arrangement was ultra vires or contrary to public policy in the absence of some clear prohibition.

But in the present case one is not left without guidance from authority. In the case of *Huntingdon* v. *Lancashire and Yorkshire Ry. Co.* (1) the railway company acquired land for a siding on the terms that they would erect a warehouse and construct a siding on the land so as to connect their main line with the warehouse, and that they would haul from the neighbouring siding, free of charge, waggons consigned to the owners of the trader's mills, would take away at their own expense all coverings used for such traffic, and afford to the owners or occupiers of the mills free use and enjoyment of the warehouse. The Court of Appeal, before whom the case ultimately came, held that the siding was

(1) 11 Ry. & Ca. Tr. Cas. 237.

a siding belonging to the railway company, but that their user was subject to the easement granted to the trader. All the three members of the Court agreed that the trader possessed this easement, whereas, if the contention of the appellants be right, the agreement was invalid and was incapable of creating an easement in favour of the original owner of the lands. There is another case which still more forcibly shews that no such general rule of law exists as is contended for by the appellants. In the case of *Staveley Co.* v. *Midland Ry. Co.* (1) the agreement in issue in the present case was before this Court in a litigation between the two parties thereto as to its meaning and scope. This Court interpreted the agreement and made a declaration as to the obligations of the parties thereunder. In the presence of two cases in which this Court has recognized the validity of agreements which would be void as ultra vires and against public policy if the principle contended for by the appellants was a sound one I cannot accept that principle, and I hold that agreements for the acquisition of land are not rendered invalid by their containing, as part of the consideration from the railway company, stipulations as to easements and services over the land so acquired.

It must not, however, be supposed that I am deciding in any way on the permissibility of agreements whereby the railway company enter into similar obligations with regard to future services to be performed outside the land acquired, that is to say, on other parts of the railway system. That point does not arise in the present case, and I express no opinion upon it.

If, then, the agreement be valid, the only question that remains is whether it is adequate to prevent the difference of treatment of the appellants from being an undue preference. After the decision of this Court in *Pickering Phipps* v. *London and North Western Ry. Co.* (2), and especially in view of the dicta in the judgment of Lord Herschell in that case, it is impossible to doubt that this is in the present case a question of fact with respect to which there is no appeal.

I ought to add that some of the services undertaken by the railway company, such as the shunting within the Staveley

(1) Not reported. (2) 8 Ry. & Ca. Tr. Cas. 83.

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Company's works, as they remained after the severance are such that no question of ultra vires can arise upon them. They are services performed outside the railway system and are not the subject of public rates or tolls. But inasmuch as an agreement is ultra vires if any portion of it is so, and as there are other services to which this observation does not apply, I have not thought it necessary to deal specifically with them.

I am therefore of opinion that this appeal must be dismissed with costs.

FARWELL L.J. Unless the agreement of November, 1866, is illegal, it is, in my opinion, impossible for the appellants to succeed. The appellants' complaint is that the railway company makes a difference in treatment between the appellants and the Staveley Company: they put their complaint on that ground rather than on an allegation of lower tolls, rates, or charges, because there is no doubt that there is "a difference in treatment" and that this casts on the company the burden of proving that such difference does not amount to undue preference; whereas if they alleged that the tolls, rates, and charges were lower the burden of proving it would be on them. The company put in evidence the agreement of 1866 and rely upon it as "a consideration" proper to be regarded as affecting the case, and also as (in one event) shewing that the inequality (if any) cannot be removed without unduly reducing the rates charged to the appellants within the meaning of s. 27, sub-s. 2, of the Railway and Canal Traffic Act, 1888. If the agreement is a valid and subsisting agreement, it is clearly a consideration affecting the case—*Fairweather & Co.* v. *Corporation of York* (1)—and, if it is taken into consideration, the result is a question of fact on which there is no appeal: see Lord Herschell's judgment in *Pickering Phipps* v. *London and North Western Ry. Co.* (2); and this is only reasonable, for the majority of the Railway Commissioners are appointed as practical men of business, whose experience renders them more capable of forming an opinion on questions of the relative value of services, and the consideration for them, than we can be. Again, if the

(1) 11 Ry. & Ca. Tr. Cas. 201. (2) 8 Ry. & Ca. Tr. Cas. 83, at p. 96.

agreement of 1866 is valid, the Staveley Company can put it in force and recover damages, or obtain an injunction and damages. Now the appellants require the railway company to put them on an equality with the Staveley Company. The railway company can do this in one of two ways: they can raise the rates, &c., charged against the Staveley Company to the same amount as those charged to the appellants, or they can reduce the appellants to the level of the Staveley Company. If they adopt the former course, the Staveley Company can recover damages against them for breach of covenant, the measure being the difference between the amount charged and the amount payable under the agreement; and I see no way in which the appellants can prevent the payment of such damages, or can impeach an agreement to continue to pay such damages without action in futuro, for it would be manifestly unjust to compel the railway company to reduce all their rates to $1\frac{1}{4}d.$ If so, the appellants succeed in form only, and these proceedings are practically useless. This is certainly a matter for the Commissioners to consider. But assume that the Staveley Company obtains an injunction restraining the Midland Railway from charging more than the agreed rates, it is plain that the rates payable by the appellants and other traders cannot be brought down to the same money payment without unduly reducing the rates charged to the complainant. It is equally plain that it would be unjust to leave out of sight the compensation paid by the railway company in 1866. The railway acquired in 1866 $4\frac{1}{2}$ miles of line belonging to the Staveley Company which bisected their works. It is obvious that the compensation properly payable at the time for these premises and for severance was very large and very difficult of exact ascertainment. The parties solved the difficulty by a lump sum, which may well have represented the value of the chattels and other things capable of actual valuation, and by providing for payment of $1\frac{1}{4}d.$ per ton for every journey for the carriage of all minerals and other goods traffic upon the $4\frac{1}{2}$ miles of railway comprised in the agreement, or upon the vendors' branches or sidings into their own works. The bargain was admittedly bona fide and appears to me to have been founded on the fair basis of making the consideration

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Farwell L.J.

money proportionate to the amount carried over the premises. I see no reason why the compensation payable by the company in this case should not have taken the form of a rent-charge, nor why such rent-charge should not have been a sum proportionate in each year to the amount of goods carried over the premises in the same year. A rent-charge, like a rent, must be certain; but such a rent-charge as I have suggested is ascertainable with certainty and is therefore certain: *Daniel* v. *Grace*. (1) The rent-charge in each year would then be the rates, &c., charged to other traders for the same goods less $1\frac{1}{4}d.$ per ton, and the Staveley Company would be debited in each year with tolls, rates, &c., of the same amount as other traders, and would be credited with the amount of rent-charge, leaving the net balance, $1\frac{1}{4}d.$ per ton, as due. It is clear that the $1\frac{1}{4}d.$ charged to the Staveley Company is not the full rate payable by them: it was for the Commissioners to ascertain as a fact whether having regard to this agreement there was any undue preference, and I agree with Mr. Gathorne-Hardy's statement (2): "If we had to disregard the terms of the agreement, the applicants and all other traders on the line would be really receiving the benefit of considerations they had not given."

If the agreement of 1866 were illegal the case would be entirely different. For instance, if a company, in order to induce a trader to send his goods by their line, agreed to carry his goods at a fixed rate per ton, such agreement would be no answer to an application to the Commissioners by other traders. If it were construed as an agreement to carry for the fixed sum, notwithstanding that higher rates were charged to other traders, the agreement would be illegal and probably unenforceable by either party; but whether the other party could enforce it or not, the Commissioners could at any rate prevent evasion of undue preference by an order reducing the charges to all to the agreed rate, instead of allowing the company the option of breaking the agreement and paying damages, and in such a case there would be no injustice in doing so. My judgment in the present case depends entirely on the reasonable nature of the agreement of 1866 and on its limitation in the manner above

(1) (1844) 6 Q. B. 145. (2) [1909] 1 K. B. 508.

pointed out, but I can see no ground whatever on which the agreement of 1866 (which has already been dealt with in this Court as a valid agreement inter partes) can be avoided. In my opinion the appeal should be dismissed with costs.

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Appeal dismissed.

Solicitors: *Neish, Howell & Haldane; Beale & Co.*

W. C. D.

[IN THE COURT OF APPEAL.]

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In re A DEBTOR (No. 1103 OF 1909).

Bankruptcy—Costs—Jurisdiction—Dismissal of Bankruptcy Petition—Order on Debtor for Payment of Part of Petitioning Creditor's Costs—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 105, *sub-s.* 1—*Bankruptcy Rules*, 1886, *r.* 183, *sub-r.* 1.

Upon the construction of s. 105, sub-s. 1, of the Bankruptcy Act, 1883, and r. 183 (1.) of the Bankruptcy Rules, 1886, the Court has no jurisdiction to order a debtor to pay any part of the petitioning creditor's costs of an unsuccessful bankruptcy petition.

APPEAL from an order of one of the registrars in bankruptcy.

On August 21, 1909, the petitioning creditor commenced an action against the debtor for 2625*l.* for money had and received, with interest and costs.

On September 14 the petitioning creditor signed judgment under Order XIV. against the debtor for 2633*l.* and 8*l.* costs, and on the same day he served a bankruptcy notice on the debtor in respect of the judgment. This notice was not complied with.

On September 21 the debtor took out a summons against the petitioning creditor, asking that the judgment might be set aside and that the debtor might have leave to defend the action as to the sum of 1265*l.*

On September 24 this summons was dismissed, but an extension of the time for appealing from the judgment was granted.

On September 28 the petitioning creditor presented a bankruptcy petition against the debtor.

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On September 29 the debtor appealed to the judge in chambers against the judgment.

On October 18 Sutton J. ordered that upon payment into Court of the sum of 1800*l.* within ten days from the date of the order the judgment of September 14 should be set aside and the debtor should be at liberty to defend the action.

On October 25 the debtor appealed from this order and asked for unconditional leave to defend.

On October 28 the bankruptcy petition came on for hearing and was adjourned for a fortnight on the ground of the pending appeal.

On November 6 the appeal came on for hearing and it was ordered that if the debtor should pay into Court within seven days from the date of the order the sum of 400*l.* he should have unconditional leave to defend the action.

On November 11 the bankruptcy petition again came on for hearing and the 400*l.* was paid into Court by the debtor. The registrar dismissed the petition, but, being of opinion that the petitioning creditor had obtained a substantial success by the payment of the 400*l.* into Court to meet his claim, he ordered the debtor to pay all the petitioning creditor's out-of-pocket costs and two-thirds of his profit costs. Leave to appeal was refused.

The debtor, having obtained leave to appeal from the Court of Appeal, appealed against so much of the order as related to the payment of costs and asked that the petitioning creditor might be ordered to pay the costs of the petition.

Barrington Ward, for the appellant. The registrar has no jurisdiction to compel a debtor to pay any part of the costs of an unsuccessful bankruptcy petition. Sect. 105, sub-s. 1, of the Bankruptcy Act, 1883, gives the Court a discretion as to the costs of any proceeding in Court "subject to the provisions of this Act and to the general rules." Rule 183 (1.) of the general rules says that all proceedings under the Act down to and including the making of a receiving order shall be at the cost of the party prosecuting the same. That rule provides how the costs of proceedings in bankruptcy are to be dealt with and furnishes a short comprehensive code on the subject. The effect of it is to

take this case out of the discretion provided by the Act. Rule 129 shews that an appeal for costs in bankruptcy will lie. Further, in this particular case there was no evidence to support the grounds on which the registrar purported to exercise his discretion. *In re Raynes Park Golf Club* (1) shews that the order appealed from is divisible. It is, first, an order that the debtor shall not get any costs, and, secondly, an order that he shall pay costs.

Hansell, for the respondent. Rule 183 applies only to a case where a receiving order is made; it has no application to the dismissal of a petition. The scope and object of the rule is to give the petitioning creditor a claim upon the estate. The general discretion given by s. 105 applies unless it is taken away by r. 183, and there is no reason for construing that rule in such a way as to put the debtor in a better position than any other fighting litigant.

COZENS-HARDY M.R. This is a case not without importance, which turns upon the construction of one section of the Bankruptcy Act and one of the Bankruptcy Rules. Sect. 105, sub-s. 1, says: "Subject to the provisions of this Act and to general rules, the costs of and incidental to any proceeding in Court under this Act shall be in the discretion of the Court." Among the general rules which are referred to is r. 183. Sub-r. 1 of that rule provides as follows: "All proceedings under the Act down to and including the making of a receiving order shall be at the cost of the party prosecuting the same." That is the first limb of the rule. Then it goes on: "But when a receiving order is made"—that means "if and when a receiving order is made"—"the costs of the petitioning creditor . . . . shall be taxed and be payable out of the proceeds of the estate, in the order of priority prescribed by these rules." What has happened here? The petitioning creditor applied for a receiving order. At the date when he presented the petition he had obtained judgment under Order XIV. That judgment has since been set aside by the Court of Appeal. It was true it was set aside upon the terms of 400*l.* being paid into Court, but there is no

(1) [1899] 1 Q. B. 961.

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judgment against the debtor now, and Mr. Registrar Linklater dismissed the petition. But, taking the view that at the date of the presentation of the petition the petitioning creditor was prima facie right and that he got some advantage by the payment of the 400*l.* into Court, he ordered the debtor to pay the petitioning creditor's out-of-pocket costs in full and a certain proportion of his profit costs. The question is, Had he jurisdiction to do that? I think not. I can only read the first limb of the rule as meaning that all proceedings under the Act down to and including the making of a receiving order are to be at the cost of the petitioning creditor, and it is only in the event of the making of a receiving order that any other provision for costs can be made. In my opinion the costs of the petitioning creditor are distinctly and deliberately taken out of the discretion of the Court, and therefore the registrar had no jurisdiction to make this order as to costs, and the appellant is entitled to have that part of the order discharged and to have the costs of the appeal. The petition will be dismissed without costs.

FLETCHER MOULTON L.J. I agree.

FARWELL L.J. I agree. If r. 183 is read into s. 105 the matter becomes quite clear. As to the meaning of r. 183 itself I cannot doubt that the first two limbs are a positive enactment qualified only by what follows in the event of a receiving order being made.

Appeal allowed.

Solicitors for appellant: *Warlow & Patey.*
Solicitors for respondent: *Dyson & Co.*

H. B. H.

[IN THE COURT OF APPEAL.]

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FOLEY'S CHARITY TRUSTEES *v.* DUDLEY CORPORATION.

Highway—Presumption of Lost Grant—Ex-turnpike Road—Vesting in Local Authority—Land acquired for widening Turnpike Road—Fee Farm Rent—Payment for long Period—Liability of Local Authority—Public Health Act, 1848 (11 & 12 *Vict. c.* 63), *s.* 68.

For more than one hundred years a fee farm rent had been paid to certain charity trustees in respect of a piece of land acquired for the widening of a turnpike road and since forming part of the road, but no conveyance to the turnpike trustees was forthcoming. The rent-charge was paid, first, by the turnpike trustees, who had statutory power to buy land for widening the roads under their control, and, on the expiration of the turnpike trust in 1871 by virtue of the Annual Turnpike Acts Continuance Act, 1870, by the defendant corporation, in whom as the highway authority the road had become vested under the Public Health Act, 1848. The corporation having refused to make any further payments, the charity trustees brought an action against them in the county court for arrears of the rent-charge :—

Held, that the Court ought to presume that the land had been granted to the turnpike trustees as land subject to a perpetual rent-charge, and that the defendant corporation were liable as terre tenants for the payment of the rent-charge.

Appeal from a decision of a Divisional Court (Darling and A. T. Lawrence JJ.).

The action was brought in the county court of Dudley by the present trustees of the charity of Thomas Foley, commonly called the Old Swinford Hospital, against the corporation of Dudley for 5*l.* 14*s.*, being three years' arrears of rent in respect of a piece of land at Queen's Cross, Dudley, forming part of a highway known as Brettel Lane, near Dudley. By 13 Geo. 1, c. 14, certain highways near Dudley, including Brettel Lane, were placed under the control of turnpike trustees for a period of twenty-one years, and the powers of the trustees were continued from time to time until 1871, when they were put an end to by the Annual Turnpike Acts Continuance Act, 1870 (33 & 34 Vict. c. 73), and thereupon the highway became vested in the defendants under s. 68 of the Public Health Act, 1848. By 27 Geo. 3, c. lxxxii., power was given to the

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turnpike trustees to widen the roads under their control in the Dudley district, and it was provided that out of the moneys which should come to their hands for the care of the roads in the district they should "pay or make satisfaction to" the landowners affected for the lands used for such widening and for the damage to be occasioned thereby; and all corporations, trustees, &c., were empowered to sell lands for that purpose. About the year 1802 the turnpike trustees apparently acquired the strip of land in question in this action and added it to Brettel Lane. No conveyance was forthcoming, but in a lease by the charity trustees dated October 6, 1802, of certain mining rights under the adjoining lands the land in question was described as "land lately taken from these lands and laid in the turnpike road containing twenty-one perches." From that time forward a fee farm rent of 1*l.* 18*s.* in respect of this land was paid first by the turnpike trustees and afterwards by the Dudley Corporation until 1904, when they refused to make any further payment.

The county court judge held that the Turnpike Trust Acts did not authorize a sale on fee farm rent and that he could not assume a lost grant in that form. He therefore gave judgment for the defendants.

The plaintiffs appealed to the Divisional Court.

The Divisional Court (Darling and A. T. Lawrence JJ.) allowed the appeal. After disposing of an argument founded on the Mortmain Act and the Charitable Trusts Act, 1855, that the plaintiffs were not competent to sell, and pointing out that those Acts did not apply, they held that the Court ought to presume a grant of the land to the turnpike trustees at a fee farm rent, and that, as the highway was vested in the defendants by the Public Health Act, 1848, they were liable to pay the rent-charge.

The defendants appealed.

Horace Avory, K.C., and *H. J. Rowlands*, for the appellants. Brettel Lane was made subject to a turnpike trust by 13 Geo. 1, c. 14, which speaks of the lane as a highway, and, in the absence of evidence to the contrary, that means a highway repairable by

the inhabitants at large. That trust was continued by various Acts of Parliament until 1871, when it expired by virtue of the Annual Turnpike Acts Continuance Act, 1870. Thereupon the road reverted to its original state and became vested in the appellants under s. 68 of the Public Health Act, 1848, which is similar to s. 149 of the Public Health Act, 1875. The appellants, however, are not in possession of the land, but are in control of so much of the soil as is necessary for the protection of the road; they are not the successors of the turnpike trustees, and they are not terre tenants: *Finchley Electric Light Co.* v. *Finchley Urban District Council.* (1)

[COZENS-HARDY M.R. That case does not help you on the question whether the appellants are in possession. *Mayor of Tunbridge Wells* v. *Baird* (2) shews that what is vested in the corporation is much more than control.]

The appellants have not such a possession as renders them liable to this rent-charge. If an owner dedicates a piece of land to the public as a highway he may still take a rent for the soil.

[FARWELL L.J. referred to the definition of "terre tenant" in Stroud's Judicial Dictionary and to *In re Herbage Rents, Greenwich.* (3)

COZENS-HARDY M.R. referred to the definition in Jacob's Law Dictionary.]

The appellants are not in possession of the whole of the soil, and in order to make them liable for this rent-charge it is necessary that the other parties interested should be joined.

Astbury, K.C., and *W. G. W. Hastings*, for the respondents. The appellants are liable in an action at law for this rent-charge on the principle of *Thomas* v. *Sylvester.* (4) The piece of land in question admittedly forms part of the highway, which is vested in the appellants by the Public Health Act. That vesting confers upon the highway authority the possession and ownership of so much of the soil as is required for the purposes of the highway. *Finchley Electric Light Co.* v. *Finchley Urban District Council* (1) is not an authority to the contrary. The interest which the appellants take is a statutory fee simple interest

(1) [1903] 1 Ch. 437.
(2) [1896] A. C. 434.
(3) [1896] 2 Ch. 811.
(4) (1873) L. R. 8 Q. B. 368.

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determinable in an event which has not happened, namely, on the road ceasing to be a highway: *Rolls* v. *Vestry of St. George the Martyr, Southwark.* (1) To the extent of their interest their rights over the soil do not differ from the rights of private owners: *Wednesbury Corporation* v. *Lodge Holes Colliery Co., Ld.* (2) That case was, no doubt, reversed in the House of Lords upon another point (3), but this point was in no way affected. The interest of the appellants in the soil is of such a nature as to constitute them terre tenants within the meaning of *In re Herbage Rents, Greenwich.* (4)

[COZENS-HARDY M.R. The decision of Stirling J. would appear to shew that the definition in Jacob's Law Dictionary is too wide.]

Upon either view the appellants are terre tenants, because this is ownership as distinct from mere possession: they are not mere termors; they do not hold simply as bailiffs of the freeholder. That case also shews that it is not now necessary to join all the terre tenants in an action for recovery of a rent-charge.

H. J. Rowlands in reply. The purchase contemplated by the Turnpike Trust Act was an out and out purchase, not a purchase in consideration of a perpetual rent-charge. There must be some reasonable ground for presuming a lost grant.

[FARWELL L.J. The Court may presume that the turnpike trustees acquired this land subject to a pre-existing rent-charge. *Goodman* v. *Mayor of Saltash* (5) shews to what lengths the Court will go in applying this doctrine.]

COZENS-HARDY M.R. This appeal, although it deals with a very small amount, raises questions of law which are both abstruse and difficult, and, but for the help we have obtained from some of the judgments of the Court in the cases referred to in the arguments, I should certainly have desired an opportunity of considering my judgment; but under the circumstances I do not think that anything will be gained by adopting that course. The facts are

(1) (1880) 14 Ch. D. 785, 796.
(2) [1907] 1 K. B. 78, 89.
(3) [1908] A. C. 323.
(4) [1896] 2 Ch. 811.
(5) (1882) 7 App. Cas. 633.

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shortly these. For more than one hundred years a small rent-charge of 1*l.* 18*s.* has been paid to the trustees of Foley's charity, and the evidence shews that it was paid in respect of a strip of land which was taken from the Foley trustees for the purpose of widening what was then a narrow highway called Brettel Lane. The road was widened by turnpike trustees. The turnpike trustees had their existence and their rights and their powers continued from time to time until the Annual Turnpike Acts Continuance Act, 1870, which put an end to them. They actually came to an end in 1871. The effect of that general Act was to bring this highway under the Public Health Act, 1848, which has since been supplanted by the Act of 1875. The effect of that was that the road, which before the Turnpike Acts was a road repairable by the public, was vested, so far as it was a road or street, in the defendants, the Dudley Corporation, who are the road authority. For many years, I think from 1873 or thereabouts until 1904, the corporation paid this rent. Then they ceased to do so, and the charity trustees brought this action in the county court against the corporation for arrears of this rent-charge. Various defences were set up which I do not think it necessary to refer to, because they have not been relied upon here, although they seem to have been dealt with and to some extent to have influenced the judges in the Court below. The only point which has been put forcibly before us is this. It is said, "We the defendants are not universal successors of the turnpike trustees. True, the Court ought to presume, if it can, after such a long payment, some legal origin for this rent-charge, but although the turnpike trustees may have taken, and it must be assumed that they did take, a conveyance subject to this fee farm rent, yet the case of *Finchley Electric Light Co.* v. *Finchley Urban District Council* (1) conclusively shews that we are not their universal successors"; and it is suggested that that is sufficient to dispose of the claim. In my view it is by no means sufficient. In my view it is not necessary to prove that the person liable to a rent-charge issuing out of land is a person who claims directly under or as successor to the prior owner. The real question seems to me to be this: Aye or No, are the defendants terre tenants within the

(1) [1903] 1 Ch. 437.

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meaning of that phrase as used in the old authorities, and as such, since the abolition of real actions, liable to an action at law for the recovery of the rent-charge on the principle laid down by the Court of Queen's Bench in *Thomas* v. *Sylvester* ? (1) It is, to my mind, not open to this Court to question that road authorities in the position of the defendants have a property in and possession of the surface of the road, and of and in an undefined depth below the surface, and have also a property in an undefined section of the air above, so far in each case as is necessary for the discharge of their duties. That has been decided, to mention two only of the cases, by the Court of Appeal in *Coverdale* v. *Charlton* (2) and by the House of Lords in *Mayor of Tunbridge Wells* v. *Baird* (3), where the proposition, that the property is vested in the road authority to a certain depth for certain purposes is stated in perfectly unambiguous terms. If further authority were wanted as to the nature of that interest, I adhere to the view which was expressed by me, and more explicitly by Farwell L.J., in *Wednesbury Corporation* v. *Lodge Holes Colliery Co., Ld.* (4), that in such a case the road authority may maintain an action of trespass as well as an action of nuisance. In fact, as I think I put it, it is a fallacy to say that a road authority, whose rights to the soil are limited, are, to the extent of those rights, in a worse position than a private owner, whose rights to the soil are unlimited. What then is the position? I think that the true position is this: that the road authority have what I may venture to call a determinable statutory fee simple interest in such portion of the soil as is vested in them at all. Certainly it is not the interest of a termor, certainly it is not the interest of a mere bailiff. It seems to me impossible to doubt that, to the extent of that which is vested in them, it is an interest of such a nature as according to the old law would have enabled an action of novel disseisin to be maintained against them. The judgment of Stirling J. in *In re Herbage Rents, Greenwich* (5), is such a mine of learning that it is impossible for me to attempt to

(1) L. R. 8 Q. B. 368.
(2) (1878) 4 Q. B. D. 104.
(3) [1896] A. C. 434.
(4) [1907] 1 K. B. 78, 89, 90.
(5) [1896] 2 Ch. 811.

go beyond it, and I will not occupy the time of the Court in reading it. He points out quite clearly what in a case of this kind are the remedies of a rent-charge owner against a person who is a terre tenant. The latter is called the pernor of the rents and profits, and he is equally liable although there is nothing for him to perne. It is no answer, therefore, for the defendants to say that in truth and in fact they do not get any advantage out of this road. They are liable because they are in possession of the land, not in the full sense, no doubt, usque ad inferos, but they are in possession, and they are in possession not as termor or bailiff, but in a character which renders them liable to the rent-charge.

That being so, it seems to me reasonably plain, although not perhaps precisely for the same reasons as were adopted in the Divisional Court, that we are enabled to do here that which beyond all doubt the justice of the case requires, and to hold that the defendants are liable, as the Divisional Court has held that they are liable, to pay this rent-charge which has in fact been paid for more than one hundred years. I do not think it necessary to enlarge upon our duty in a case like this to make every presumption which can be made to support such a long-continued possession. I feel no difficulty whatever in holding that we can presume that which we ought to presume, namely, that this property was vested in the turnpike trustees subject to a fee farm rent-charge issuing out of the land. For these reasons I think that the appeal must be dismissed.

FLETCHER MOULTON L.J. I am of the same opinion. I do not propose to refer to any of the points upon which the judgments of the learned judges in the Court below were based, because the rights of the parties appear to me to be clear upon the line of reasoning which the Master of the Rolls has followed. Shortly I will put it thus. I have no doubt whatever that the right presumption in this case is that the turnpike trustees became possessed of this land as land subject to a perpetual rent-charge, and that they added it to the highway, of which it to this day remains a part. When the turnpike trust ceased the highway became vested in the defendant corporation. *Finchley*

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Electric Light Co. v. *Finchley Urban District Council* (1) is decisive upon the point that by the vesting of the highway in the corporation they did not become successors of the turnpike trustees, and that no title can be made against them as such; but it is equally decisive as shewing (if any authority were needed upon the point, because it is clearly the result of the Act of Parliament) that the highway as a highway vested in them. What is the meaning of the highway vesting? There have been many attempted definitions, but I take as the best the definition which Farwell L.J. gave in *Wednesbury Corporation* v. *Lodge Holes Colliery Co., Ld.* (2), a definition which was in no way disapproved of by the House of Lords, and which, I think, is in accordance with all the cases, that, "at any rate, the surface of the street, and so much of the actual soil of the road as may be necessary for its preservation as a road, are vested in the local authority." Therefore the defendants have this property in the land in question. It certainly includes the surface, and it includes so much as is necessary to support the surface as a road. For what period does this last? It is a fee simple subject to this, that if the road should be properly and legally abandoned and cease to be a highway, then the freehold will revert to some other person. In my opinion that does not make them termors in any way. They have got what for this purpose may be taken to be a fee simple interest in the surface of the road and something beyond. That land is subject to this rent-charge. In my opinion they are in possession of the land, and they are liable to pay that rent-charge. It seems to me that those were really the only rights which were in existence. We do not know whether there are any other persons in possession of other rights in this land. If so, perhaps they, by virtue of their possession, might also have been sued, but they were not. The corporation are sued. Pleas in abatement having been now abolished, there is no answer to the fact that they are liable. For these reasons I think that the decision of the Court below was right and that this appeal must be dismissed with costs.

FARWELL L.J. I am of the same opinion. I do not propose to discuss the reasons given by the Divisional Court, because I

(1) [1903] 1 Ch. 437. (2) [1907] 1 K. B. 78, 90.

have come to this conclusion upon the same grounds as my brethren. The payment has gone on for a great many years. It is suggested that under the statute (27 Geo. 3, c. lxxxii.) the turnpike trustees could not buy land at a rent-charge. After payments extending over a century it is the duty of the Court to presume anything which is possible to give that rent-charge a legal origin, and it is certainly possible that the owners of this piece of land sold it subject to this rent-charge or that they gave it to the turnpike trustees subject to this rent-charge without requiring any further payment, which would be a perfectly natural and proper transaction. Therefore I think that there is no reason to suppose that the rent-charge was not validly created.

Then there comes the question of the estate of the defendants. It is not a question of any dispute as to the extent of the transfer of the rights of the turnpike trustees, as it was in *Finchley Electric Light Co.* v. *Finchley Urban District Council* (1), but merely a question upon the section of the Public Health Act which vests the streets in the defendants. I will not go through the various definitions. I refer to what I have already said and what the Master of the Rolls said in *Wednesbury Corporation* v. *Lodge Holes Colliery Co., Ld.* (2) I think that the estate of the authority may be defined either as a statutory freehold or as a statutory fee simple conditional. It is plain that it is statutory, and the somewhat anomalous nature of the estate is immaterial because it is created by Act of Parliament. Sir George Jessel in the case of *Sevenoaks, Maidstone, and Tunbridge Ry. Co.* v. *London, Chatham, and Dover Ry. Co.* (3), where there was a question of a lease in perpetuity, a thing, of course, unknown to the law, said this: "I am by no means going to determine what the effect of the agreement would be if it were not enacted by Act of Parliament, and if it were merely a contract between individuals. An Act of Parliament has power to create interests which were unknown to the common law, and which could not be created between individuals by contract." That appears to me to shew that the true definition is either statutory fee simple conditional or statutory freehold.

(1) [1903] 1 Ch. 437. (2) [1907] 1 K. B. 78.
(3) (1879) 11 Ch. D. 625, 635.

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Farwell L.J.

Having arrived at that, the case is simplified for us by the admirable and exhaustive judgment of Stirling J. in *In re Herbage Rents, Greenwich.* (1) It is settled by authority that the owner of the rent might sue the terre tenant in debt although the terre tenant was not the original grantor. "If," as Stirling J. says (1), quoting Quain J. in *Thomas* v. *Sylvester* (2), "a man comes into possession of land as tenant in fee,"—that is to say, either statutory fee simple conditional or freehold,—"he is the pernor of the profits of the land and is liable to a real action for the non-payment of a rent-charge created by a former tenant in fee; if this be so, since real actions are abolished, an action of debt will lie." Then, as Collins J. decided in *Pertwee* v. *Townsend* (3), the action lies, and the owner of the rent-charge is entitled to recover whether the defendant in possession has, or has not, in fact received rents and profits. The question, as Stirling J. says, is, "Who is the proper defendant to an assize of novel disseisin for non-payment of rent?" and he shews conclusively in his judgment that the owner of the freehold is the person, and not the tenant for years, which was the point in that particular case, and he points out further that, although he could have pleaded in abatement if all the terre tenants were not present, which was one of the points taken here on behalf of the appellants, it is no longer necessary that all the terre tenants should be parties. That was decided in *Christie* v. *Barker.* (4) In fact, the learned judge has, I think, foreseen the answer to all the arguments which have been presented by the appellants' counsel in the present case. The result is that in my opinion this appeal fails, although not, as I have said, for the reasons given in the Court below.

Appeal dismissed.

Solicitors for appellants: *Sharpe, Pritchard & Co., for A. B. Whitehouse & Co., Dudley.*

Solicitors for respondents: *Rawle, Johnstone & Co., for Bernard, King & Sons, Stourbridge.*

(1) [1896] 2 Ch. 811, at p. 817.
(2) L. R. 8 Q. B. 368.
(3) [1896] 2 Q. B. 129.
(4) (1884) 53 L. J. (Q.B.) 537.

H. B. H.

[IN THE COURT OF APPEAL.]

C. A.
1909
Nov. 26, 29;
Dec. 15.

In re ENOCH AND ZARETZKY, BOCK & CO.'S ARBITRATION.

Arbitration—Umpire—Witness called by Umpire—Misconduct—Evidence—Removal—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *s.* 11.

Neither a judge nor an umpire has any right to call a witness in a civil action without the consent of the parties.

Coulson v. *Disborough*, [1894] 2 Q. B. 316, commented on.

Arbitrators are bound to observe the rules of evidence no less than judges.

Attorney-General v. *Davison*, (1825) M'Cl. & Y. 160, considered. *In re Keighley, Maxsted & Co. and Bryan Durant & Co.*, [1893] 1 Q. B. 405, explained.

APPEAL from a decision of a Divisional Court (Darling and A. T. Lawrence JJ.).

By a contract of September 11, 1907, Messrs. Enoch, the buyers, bought 1500 tons of Rangoon rice bran from Zaretzky, Bock & Co., Limited, the sellers, and the contract contained an arbitration clause. Disputes arose; the sellers appointed a Mr. Harvey and the buyers appointed a Mr. Norton as their arbitrators; and the arbitrators appointed Mr. F. W. Von Lymburg to be umpire. Mr. Milner Brown was subsequently appointed instead of Mr. Harvey, who was ill. The proceedings under the arbitration, according to the statement of the sellers, were not conducted fairly and impartially by the umpire. In particular it was alleged that at an early date he had made up his mind against their contention and did not give proper consideration to their case; that he insisted on the attendance of Mr. W. Zaretzky to give evidence, and that he would not give them an adjournment to get evidence from Rangoon. Without their consent, and without informing them of the nature of the evidence, he himself, of his own initiative, called as a witness a Mr. Kolwey, to whose evidence, including a copy of an award produced by him, he attached great weight; and he refused to admit some of their evidence, but ruled, without hearing it or waiting for their further evidence from Rangoon, that the bran

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was not in proper condition at the time of shipment. In reply to a request by the sellers that he would state certain questions of law for the opinion of the Court, the umpire wrote that he was quite willing to comply with this request, but he must ask them to hand him first a cheque for 150*l.* on account of legal expenses, &c.

The sellers gave notice of motion for an order that the umpire should be removed and the matters in dispute remitted to the arbitrators, to be heard by them, and a new umpire to be appointed by them, or that leave should be given to revoke the submission, on the ground that the umpire had misconducted himself by obtaining and receiving evidence against Zaretzky, Bock & Co., Limited, behind their backs, and by receiving evidence against them which he had himself obtained, without giving them any notice of the nature of such evidence, and by rejecting material evidence which Zaretzky, Bock & Co., Limited, wished to give, and by refusing to give them an opportunity of obtaining and giving evidence to meet the evidence obtained by himself, and by making up his mind and pronouncing a decision against their case and in favour of Messrs. Enoch before hearing that evidence, and by shewing personal bias against Zaretzky, Bock & Co., Limited, throughout the arbitration proceedings and not giving their evidence and arguments a fair hearing.

At the hearing of the motion an affidavit by the umpire was read, in which he said that he did not propose to deal controversially with the allegations that had been made, but simply to state the facts so far as they seemed to him material for the information of the Court.

The Divisional Court dismissed the motion, and the sellers appealed.

Simon, K.C., and *Maurice Hill*, for the appellants. The umpire ought to be removed under s. 11 of the Arbitration Act, 1889. *Larchin* v. *Ellis* (1) defines what is reasonable conduct on the part of an arbitrator, and the general principles to be observed by him are discussed in *In re an Arbitration between Gregson and Armstrong*. (2) Whether an arbitration is conducted on the

(1) (1863) 11 W. R. 281. (2) (1894) 70 L. T. 106.

footing of a legal or mercantile arbitration, the first principles of justice must be applied: *In re an Arbitration between Camillo Eitzen and Jewson & Sons.* (1) This arbitration has not been conducted in accordance with the most elementary rules of justice, and the only proper course to adopt is to send the matter back and submit it to a fresh umpire.

Atkin, K.C., and *D. C. Leck*, for Messrs. Enoch. No award has yet been made, and the whole matter is open. The only question is whether the umpire has been guilty of such misconduct as would entitle the appellants to have him removed during the arbitration. No case has been made out to justify such a course. The only case made against him is his refusal to grant an adjournment. If the reception of any evidence is objected to, objection should be taken at once and before the summing up: *Abbott* v. *Parsons.* (2) An umpire has the same power as a judge has of calling witnesses. At the trial of an action the judge has power to call and examine a witness who has not been called by either of the parties, and, when he does so, neither party has a right to cross-examine the witness without the leave of the judge: *Coulson* v. *Disborough.* (3) The appellants in the present case raised no objection to the calling of Mr. Kolwey.

F. D. Mackinnon and *G. C. Ranken*, for the buyer's arbitrator. No reply was called for.

COZENS-HARDY M.R. This case has given me some anxiety, because it compels me to say something about a gentleman who is not directly a party to the litigation, but, having very carefully considered the whole case, I feel satisfied that this appeal must be allowed. [The Master of the Rolls stated the facts shortly, and continued.] The jurisdiction of the Court to remove an umpire for misconduct is, of course, quite plain. It is given in express terms by s. 11 of the Arbitration Act, 1889. There are at least four transactions in this case which compel me, taking them altogether, to conclude that there has been here such misconduct on the part of the umpire, Mr. Von Lymburg, as not only justifies but really compels us in the exercise of our duty to remove him.

(1) (1896) 40 Sol. J. 438. (2) (1831) 7 Bing. 563.
(3) [1894] 2 Q. B. 316.

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The first point, and one to which I attach very considerable importance, is that unfortunate transaction about the 150*l.* There was a question as to the construction of the contract, admittedly a serious question. I express no opinion upon the true view of the contract, because it is not before us; but a request was made in July, 1908, that the umpire should state a special case, and this is his reply to Mr. Milner Brown: "18th July, 1908. In reply to your favour of the 15th inst. calling upon me to state certain specified questions of law for the opinion of the Court, I beg to state that I am quite willing to comply with your request, but I must ask you to hand me first a cheque for 150*l.* on account of legal expenses, &c." Was that proper? I have not heard any explanation, and counsel could not possibly suggest anything to justify such a condition as that. It was not a casual suggestion, for on October 8 Mr. Milner Brown wrote to Mr. Von Lymburg: "I gather that you desire to impose a condition that a sum of 150*l.* shall be deposited to cover the costs of the special case. This seems to me to be an improper as well as an exorbitant demand." Was there any withdrawal of that letter? None whatever. I have looked through the correspondence from the beginning to the end, and there is nothing of the kind. On October 15 there is a letter from Mr. Von Lymburg in which he simply says: "Your letter of the 8th inst. was read and dealt with at our last meeting. It is incorporated in the dossier of the case." So that we have this umpire making the highly improper demand for 150*l.*, making it in writing, and not withdrawing it for months afterwards, when his attention is called to it and when it is described as "improper and exorbitant"; and that does seem to give a colour to the case which one cannot possibly put aside.

Then another matter which impresses me very much is this, that the umpire thought fit formally to rule that one of the parties, Mr. Zaretzky, a gentleman not personally connected with this matter and who had not been concerned with it, must give evidence. What possible authority has an umpire to do that? I do not know.

The next thing is that this umpire took upon himself to call a

gentleman whose name is Mr. Kolwey, living in London, representing a company carrying on business at Burma. What right the umpire had to call a witness I confess I do not understand. But that is not all. When this gentleman was called he then produced documents which it is really ludicrous to call evidence at all. He produced copies of certain documents which were said to shew that certain parcels of rice had been purchased at Rangoon from certain people at certain prices and of certain qualities. That being so, the vendors, Zaretzky, Bock & Co., said: "This is entirely a new point resulting from the witness whom you have thought fit to call, and we must have permission to send out to Rangoon, where we can get something deserving the name of evidence as to the place from which and the terms on which the parcels of rice which were in the cargo in question were obtained." No, the umpire would not allow the adjournment, and he actually proposed to make his award and deal with the matter on evidence which he had no right to admit, whilst preventing the sellers from adducing evidence which would be most obviously relevant.

Then I am impressed with this, that the umpire has thought fit in this dispute to make a very long affidavit, which is to my mind coloured throughout by an obvious bias in favour of the purchasers and against the sellers. I wish to make it clear that I am not suggesting fraud on the part of Mr. Von Lymburg, but I do say his conduct as umpire, as manifested by the particulars which I have given, is such that it would not be satisfactory, it would not be fair, it would not be just, to leave the rights of the parties, as they necessarily would be, in his sole hands.

I therefore think the appeal must be allowed.

FLETCHER MOULTON L.J. I am of the same opinion for the same reasons; and, so far as they deal with the facts of the case, other than one particular point to which I will presently refer, the reasons have been so admirably stated by the Master of the Rolls that I do not intend to refer to them.

The point to which I wish to allude is the question of the umpire himself procuring evidence in the arbitration. It is quite clear, both from his conduct and from the line that has

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been taken by counsel for the respondents on this appeal, that there is an idea that an umpire, a person in a judicial position, has the power, and, I suppose, the duty, to call witnesses in a civil dispute, whom the parties do not either of them choose to call. In my opinion there is no such power. A judge has nothing to do with the getting up of a case. The respondents' argument is based on a case in the Court of Appeal, *Coulson* v. *Disborough* (1), in which there are certainly dicta which require to be carefully examined. The case itself presents no difficulty; nor does the decision. It was a case where, after the counsel for both parties had spoken at the conclusion of the case, the jury intimated to the judge that there was a person present to whom frequent reference had been made, and they would like him to be called as a witness. The judge called him as a witness, but obviously without any objection being raised by either party. He asked him one or two questions, the answers to which were wholly immaterial to the issue. Counsel for one of the parties then asked leave to cross-examine, but the learned judge would not give him leave. When the case was brought before the Court of Appeal, all the judges held that the answers were immaterial, and they held that under those circumstances there was no right to cross-examine. One of the learned judges, the Master of the Rolls, Lord Esher, does, however, give utterance to a dictum which has been relied on by counsel for the respondents. He says this (2): "If there be a person whom neither party to an action chooses to call as a witness, and the judge thinks that that person is able to elucidate the truth, the judge, in my opinion, is himself entitled to call him." If that means to call him when either side objects, I am satisfied that there is no basis for that dictum; but it must be remembered that there is no suggestion in the report or the judgments that the witness was called by the judge against the will of either of the parties. It certainly was not necessary for the decision; and the consequences to which it would lead if so interpreted are such that I am satisfied that the Court of Appeal would never have given in the form of a mere dictum a decision so wide-reaching and so destructive of the fundamental principles of our

(1) [1894] 2 Q. B. 316. (2) Ibid. at p. 318.

laws of procedure. It does not purport to be based on any course of reasoning, and no authority was cited for it. I say that it would be destructive of the fundamental principles of our laws of procedure for the reason that if, according to the dictum, witnesses were called against the will of one of the parties, the civil rights of a man might be decided by evidence given by persons whose personal credibility and the accuracy of whose statements he would have no right to test by cross-examination; because the Court of Appeal laid down that if a judge calls a witness, neither party can cross-examine him as of right. Such a proposition may be most reasonable if the witness has been called with the assent of both parties, because he cannot be called a witness of either party. But it would lead to consequences which I do not like to contemplate if the dictum were supposed to apply to cases where a judge calls a witness to the facts of the case without the consent of the parties and then refuses, or has the power to refuse, to allow any cross-examination. I think, therefore, that the dictum refers only to cases where a judge has called a witness with the acquiescence of both parties, and has done so in order to get over the difficulty that if either party calls a witness he is supposed to be responsible for his personal credibility, though not for the accuracy of his statements, for it is well known that if a party calls a witness he may not attack his general credibility. There may in some cases be a person whom it would be desirable to have before the Court; but neither party wishes to take the responsibility of vouching his personal credibility, or admitting that he is fit to be called as a witness. In such a case the judge may relieve the parties by letting him go into the box as a witness of neither party; and, of course, if the answers are immaterial he may refuse to allow cross-examination. But the dictum does not lay down, and in my opinion it is certainly not the law, that a judge, or any person in a judicial position, such as an arbitrator, has any power himself to call witnesses to fact against the will of either of the parties.

FARWELL L.J. I am of the same opinion, and as I have taken the opportunity of the adjournment to look into one or two of

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the cases, I will state my views on some of the points that have been argued. Where a case is referred to two arbitrators and an umpire, it is well understood that the arbitrators act as counsel who try and settle the case without going into Court; but the umpire or a single arbitrator occupies a judicial position and exercises judicial powers, and is bound, as far as practicable, to follow legal rules, although, as Lord Halsbury says in *Andrews* v. *Mitchell* (1) "We must not insist upon a too minute observance of the regularity of forms among persons who naturally by their education or by their opportunities cannot be supposed to be very familiar with legal procedure, and may accordingly make slips in what is mere matter of form without any interference with the substance of their decisions. I should be anxious myself, as I have no doubt all your Lordships would, to give every effect to their decisions; on the other hand, there are some principles of justice which it is impossible to disregard, and, giving every credit to the desire on the part of this arbitration court to do justice, I think it is manifest that they proceeded far too hastily in this case, and, apart from imputing to them any prejudice or any desire to do wrong, I think that the mode in which the whole thing arose and was disposed of was so slipshod and irregular that it might lead to injustice."

Now several matters have arisen in the present case the cumulative effect of which is very strong. To take one or two of them—I do not propose to go through all the facts—there is the question of the reception by the umpire of a copy of an award between third persons as evidence without all the facts referred to in it being known. It is clear that in no Court of justice would that copy award be any evidence at all. But it is said, and certain statements of Lord Esher were referred to in support of it, that an umpire is not bound by the rules of evidence. With the greatest respect, I think that is not correct.

In *Attorney-General* v. *Davison* (2) Alexander L.C.B. says: "It has been contended that, in the present case, they"—that is, the Commissioners—"are in the situation of arbitrators and, as such, may do so. But I have always understood that arbitrators are bound by the same rules of evidence as the

(1) [1905] A. C. 78, at p. 80. (2) M'Cl. & Y. 160, 166.

Courts of law." Then Graham B. says: "A general statement has been made, that arbitrators may proceed in receiving evidence, without reference to principles of law or equity. Now we know that position to be contrary to law and the practice of the Courts." Garrow B. does not refer to it. But Hullock B. says: "I never understood that arbitrators were at liberty to deviate from those rules which govern the superior Courts. It is true that at nisi prius, on orders of reference, and where, generally speaking, all matters in dispute are referred, the arbitrator is usually authorized to examine the parties, or either of them, if he thinks proper, but this depends on the previous agreement of the parties, who by consent introduce it into the order of reference. I agree in opinion with the rest of the Court that this is not legal evidence, and, if it is not legal evidence, that it ought not to be received by the Commissioners."

In *In re Keighley, Maxsted & Co. and Bryan Durant & Co.* (1), which was a case on an application to remit an award because fresh evidence had been discovered since it was made, the objection was taken that it ought not to be remitted because the fresh evidence would not be good evidence if the case were tried in a Court of law. Lord Esher says (2): "The parties have agreed to go before an umpire, who is not bound by the strict rules of evidence enforced in a Court, and to be bound by his decision; and in my judgment the Court ought not to fetter the arbitrator or the parties by its own rules of evidence, but should consider whether something has been discovered since the award which the arbitrator might think material, and which might alter his decision." Lopes L.J. says (3): "I am not prepared to say that the evidence in this case might not be receivable as legal evidence." He also appears to agree, to some extent at any rate, with Lord Esher's dictum or decision, if it be so. Kay L.J. says (4): "In the present case I agree with Lopes L.J., and am not satisfied that the evidence would be inadmissible in a Court of law; and, therefore, I think that the Court may" and so on. I think, therefore, that it rests on Lord Esher, and is no doubt, so far as he is concerned, a

(1) [1893] 1 Q. B. 405.
(2) Ibid. at p. 411.
(3) Ibid. at p. 413.
(4) Ibid. at p. 415.

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decision, but with regard to the other two members of the Court it is dictum only, that the arbitrators are not bound by the ordinary rules of evidence. If it be taken literally I can only say, with the greatest possible respect, that I think it is contrary to the law as stated in the Court of Exchequer, and contrary to the established rule in our Courts. If all that was meant—as I think—is that the Court will not be extreme to mark anything done amiss in respect of the reception of evidence unless substantial injustice results, or in other words if Lord Esher was merely applying to umpires the principle that underlies the Rules of the Supreme Court, Order xxxix., r. 6, then I should agree. It is plain that the Courts do allow considerable latitude, in practice at any rate, to the reception of evidence by umpires, but to say as a general proposition that they are not bound by the rules of evidence appears to me to be entirely misleading and likely to produce very great injustice.

The Courts also, no doubt, readily treat any objection which would have been open to the reception of the evidence as waived, and in the present case, if it were not for what I am about to add, I should have thought the objection was waived. But the next objection is this: the witness who produced the copy award was called by the umpire. The statement in the affidavit is, "When Mr. Zaretzky had finished, the umpire said, 'Now I have a witness to call,' and then began to examine Mr. Kolwey, an assistant of the Burma Rice and Trading Company, Limited, who had been present during the proceedings. Mr. Kolwey produced an award of which a copy is included in the bundle forming the exhibit to this affidavit: this award was read out, and it was evident that the umpire attributed the greatest importance to it. The umpire then proceeded to examine this witness with a view to shewing" certain things. This is, in my opinion, highly objectionable. If an umpire knows of a witness who can give evidence, he should inform both of the parties and invite them to call him. It puts the parties against whom the witness gives evidence in a very difficult position when the umpire has made him his own witness by calling him and by examining him. How can they effectually object to the umpire's questions? How can they ask him

to reject a document which the witness produced, on which the umpire relies? It is said that a judge of the High Court has the power to do this on the authority of *Coulson* v. *Disborough*. (1) I am far from suggesting there is not the power, qualified in the way my brother Fletcher Moulton has stated; and if Lord Esher meant to say only that which was relevant to the facts of the case before the Court, "If there be a person whom neither party to an action chooses to call as a witness, and the judge thinks that that person is able to elucidate the truth, and neither party objects, the judge, in my opinion, is himself entitled to call him," I should not dissent. In that particular case there was a man in Court who was supposed by the jury to know certain material facts, and they desired to have him called. No one objected, and the judge called him. To that I see no objection; the Master of the Rolls says (2): "If what the witness has said in answer to the questions put to him by the judge is adverse to either of the parties, the judge would no doubt allow, and he ought to allow, that party's counsel to cross-examine the witness upon his answers. A general fishing cross-examination ought not to be permitted." To that I assent as applied to the facts of that case. I would venture, however, with respect, to criticize A. L. Smith L.J.'s statement that "a witness called in this way is the witness of the judge, not of either of the parties." I venture to think it is not accurate to say a judge ever in a civil action has a witness of his own. He is there to determine on the evidence called, and, in the case put, the witness, although called, would be a witness to be dealt with as an ordinary witness, the learned judge's qualification being true to this extent, that it is not open to the counsel on either side to comment on the evidence given on the footing that he is either the plaintiff's witness or the defendant's witness. If he meant no more than that, then I agree, but whatever power a judge of the High Court has to call such a witness, an umpire has no such power. He has not got all the power of a judge, but only such power as the Arbitration Act and the Rules of the Supreme Court, Order XXXVI., rr. 48 to 55D, give him in any case to which those rules are applicable. In my opinion the conduct of the

(1) [1894] 2 Q. B. 316. (2) Ibid. at p. 318.

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umpire in calling this witness and examining him and admitting the copy award as evidence is legal misconduct. I cannot see that the objection to the admission of the document was waived, for it was produced by the umpire's witness, and it would have been useless to object. Then he actually refused to allow an adjournment in order to enable the appellants to give evidence to test the testimony of the witness whom he had himself called. These facts appear to me to be amply sufficient even without the other matters which the Master of the Rolls has mentioned, as to which I entirely agree. The demand of 150*l.* was most improper; and taking the whole of the circumstances together as appearing from this voluminous affidavit, I think it is obvious that justice would not be done if the arbitration were sent back to the same umpire for his award. The appeal must be allowed, with costs here and below to be paid by Messrs. Enoch; the umpire will be removed, and the matters in dispute remitted to the arbitrators for the appointment of a new umpire.

Appeal allowed.

Solicitors: *Stibbard, Gibson & Co.; Waltons & Co.; W. G. Glover*

H. C. R.

[IN THE COURT OF APPEAL.]

C. A.
1909
Dec. 18.

GALBRAITH *v.* GRIMSHAW AND BAXTER.

Attachment of Debt—Scotch Judgment—Extension to England—Garnishee Order Nisi—Service on Garnishee—Subsequent Bankruptcy of Judgment Debtor in Scotland—Rights of Trustee in Bankruptcy.

A judgment for a sum of money having been obtained in an action in Scotland, the judgment was extended to England under the Judgments Extension Act, 1868, and the judgment creditor served a garnishee order nisi on a firm who owed a debt in England to the judgment debtor. Subsequently to the service of the garnishee order nisi the judgment debtor was adjudicated bankrupt in Scotland, and a trustee in bankruptcy was appointed with power to recover all the estate of the judgment debtor wherever it might be situated. In an interpleader issue between the trustee and the judgment creditor as to their respective claims to the garnished debt:—

Held that, though the debt formed part of the judgment debtor's estate, it was by reason of the service of the garnishee order nisi property subject to a charge, and the trustee was, therefore, only entitled to receive payment of the debt after first satisfying the judgment creditor's claim under the garnishee order nisi.

APPEAL from a decision of Ridley J.

On October 22, 1908, the defendants recovered judgment for 311*l.* and costs in the Court of Session at Edinburgh against Merrens & Sons. On October 26 the judgment was extended to England under the Judgments Extension Act, 1868. On October 27 the defendants obtained in England a garnishee order nisi in respect of a sum of 400*l.* owed to Merrens & Sons in England by Hamilton Smith & Co., and on the same day the order nisi was served upon them. On November 12, 1908, the estate of Merrens & Sons was sequestrated by the sheriff of Inverness under the Scotch bankruptcy law. On December 7 the plaintiff, Galbraith, was confirmed trustee of the sequestrated estate by an order in the following terms:—"At Inverness, the seventh day of December nineteen hundred and eight years, the sheriff of Inverness, Elgin and Nairn has confirmed, and hereby confirms William Brodie Galbraith, chartered accountant, Glasgow, trustee on the sequestrated estates of Merrens & Sons, watchmakers and jewellers, 5 and 7 Inglis Street, Inverness,

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and the whole of the estates and effects, heritable and moveable, and real and personal, wherever situated, of the said Merrens & Sons, are transferred and belong to the said William Brodie Galbraith as trustee for behoof of the creditors of the said Merrens & Sons in terms of the Bankruptcy (Scotland) Act, 1856 (19 & 20 Vict. c. 79), and Acts explaining or amending the same; and the said William Brodie Galbraith has, as trustee aforesaid, in terms of the said Acts, full right and power to sue for and recover all estates, effects, debts and money belonging or due to the said Merrens & Sons."

The plaintiff having claimed the garnished debt, an issue was directed, by which the plaintiff affirmed and the defendants denied, that the plaintiff, as trustee of the sequestrated estate of Merrens & Sons, was entitled to the amount that the garnishees were at the date of the service of the garnishee order nisi indebted to Merrens & Sons.

The issue was tried by Ridley J. without a jury, who gave judgment for the plaintiff on the ground that by reason of s. 108 of the Bankruptcy (Scotland) Act, 1856, the rights of the defendants under the garnishee order nisi did not prevail against the title of the trustee in bankruptcy.

The defendants appealed.

Rawlinson, K.C., and *H. Dobb*, for the defendants. If the garnishee proceedings had been taken in Scotland, the title of the trustee in bankruptcy would have prevailed over that of the garnishors by reason of s. 108 of the Bankruptcy (Scotland) Act, 1856; and if the bankruptcy had been in England, s. 45 of the Bankruptcy Act, 1883, would have been a good answer to the defendants' claim to enforce the garnishee order nisi. But as the bankruptcy is in Scotland and the garnishee proceedings are in England, neither s. 108 of the Act of 1856 nor s. 45 of the Act of 1883 has any application to the case. The position, therefore, is that the plaintiff, as trustee in a Scotch bankruptcy, comes to England to recover property of the bankrupts. That claim must be determined according to the law of this country, and under that law the defendants have a valid charge on the property in question, for the effect of the service of a garnishee

order nisi on a debtor is to create a charge on the debt: *In re Combined Weighing and Advertising Machine Co.* (1); and the plaintiff is not entitled to recover this money without first discharging the defendants' claim. [They referred to Goudy's Law of Bankruptcy in Scotland, 2nd ed., p. 640; *Hunter* v. *Palmer* (2); Dicey on Conflict of Laws, 2nd ed., p. 330.]

Radcliffe, K.C. (*Pringle* with him), for the plaintiff. By the order of a competent Court in Scotland, having jurisdiction in bankruptcy, the whole of the estate and effects of the bankrupts is vested in the plaintiff as trustee in bankruptcy: Bankruptcy (Scotland) Act, 1856, s. 102. Under s. 117 of the Bankruptcy Act, 1883 (3), that order must be enforced in England in the same manner as if it had been made in England, and, therefore, s. 45 of the Act of 1883 applies, and is a good answer to the defendants' claim to attach this debt.

[FARWELL L.J. Sect. 117 only applies to a Court having jurisdiction in bankruptcy. In dealing with this case we have no jurisdiction in bankruptcy.]

If ss. 117 and 45 of the Act of 1883 do not apply, the case is governed by the old law as to the attachment of debts owing to a foreign bankrupt, under which the title of the foreign bankrupt prevailed: *Solomons* v. *Ross* (4); *Sill* v. *Worswick.* (5) In any case the title of the trustee in bankruptcy is not defeated by the prior service of a garnishee order nisi. A garnishee order nisi does not effect an assignment or transfer of the debt to the

(1) (1889) 43 Ch. D. 99.

(2) (1825) 3 S. 586.

(3) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 117: "Any order made by a Court having jurisdiction in bankruptcy in England under this Act shall be enforced in Scotland and Ireland in the Courts having jurisdiction in bankruptcy in those parts of the United Kingdom respectively, in the same manner in all respects as if the order had been made by the Court hereby required to enforce it; and in like manner any order made by a Court having jurisdiction in bankruptcy in Scotland shall be enforced in England and Ireland . . . . by the Courts respectively having jurisdiction in bankruptcy in the part of the United Kingdom where the orders may require to be enforced, and in the same manner in all respects as if the order had been made by the Court required to enforce it in a case of bankruptcy within its own jurisdiction."

(4) (1764) 1 H. Bl. 131, n.

(5) (1791) 1 H. Bl. 665.

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garnishee, nor does it amount to a charge on the debt: *Geisse* v. *Taylor*. (1) The debt remains the property of the judgment debtor, subject to the garnishee order: *Norton* v. *Yates* (2); *In re Webster*. (3) The plaintiff has therefore a statutory legal title to this debt, as part of the bankrupt's property, of which he has never been divested, and any claim to it which the defendants may have by reason of the garnishee proceedings, which at the most is only an equitable charge, must be decided in Scotland according to the Scotch law as to the priority of creditors: *Ex parte Melbourn*. (4) It is not contended that s. 108 of the Act of 1856 has any application to this case.

FARWELL L.J. This is an appeal from a decision of Ridley J. in favour of the plaintiff in an interpleader issue. The history of the case is that on October 22, 1908, the defendants recovered judgment in Scotland against a firm, Merrens & Sons. That judgment was extended to England under the Judgments Extension Act, 1868, and thus became equivalent to a judgment obtained in this country. An English firm, Hamilton Smith & Co., owed a sum of 400*l.* to the judgment debtors, and the judgment creditors, the defendants in this case, obtained a garnishee order nisi in respect of that sum and served that order nisi on Hamilton Smith & Co. on October 27. Then, on November 12, proceedings of sequestration were instituted in Scotland against the estate of the judgment debtors under the bankruptcy law of that country, and on December 7 the plaintiff was confirmed trustee of the sequestrated estate by an order in the following terms: [The Lord Justice read the order set out above.] Hamilton Smith & Co. are ready and willing to pay the 400*l.* which they owe to the judgment debtors to whichever of the two claimants, the plaintiff and the defendants, can give them a valid discharge, and this interpleader issue was directed in order to determine that question.

It has been contended that the title of the plaintiff, as trustee in the bankruptcy in Scotland, prevails over that of the defendants by reason of s. 117 of the Bankruptcy Act, 1883,

(1) [1905] 2 K. B. 658.
(2) [1906] 1 K. B. 112.
(3) [1907] 1 K. B. 623.
(4) (1870) L. R. 6 Ch. 64.

which provides, in substance, that any order made by a Court having jurisdiction in bankruptcy in Scotland shall be enforced in England in the same manner in all respects as if the order had been made by the Court required to enforce it in a case of bankruptcy within its own jurisdiction. Now the only order made in the bankruptcy in Scotland is the order of December 7 whereby the whole of the property of the bankrupts, wherever situated, was transferred to the trustee, who is given full power to sue for and recover that property. The first question, therefore, which we have to consider is what is the property of the bankrupts which the plaintiff is seeking to recover. It is not disputed that, if this debt had been owing to the bankrupts in Scotland, the effect of s. 108 of the Bankruptcy (Scotland) Act, 1856, is that the title of the trustee in bankruptcy would prevail as against a garnishee order, or its Scotch equivalent, although the latter might have been prior to the adjudication in bankruptcy, and that this property would, therefore, be available for distribution amongst the creditors. But that is not the meaning or effect of s. 117 of the Act of 1883. That section does not mean that an order of the Scotch Bankruptcy Court is to be read and enforced by this Court in England irrespectively of the English law so as to affect adversely charges on property in England. The effect of the service of a garnishee order nisi in England was thus stated by Jessel M.R. in *In re Stanhope Silkstone Collieries Co.* (1): "The attachment or garnishee order is a mode of enforcing by execution the payment of the debt in the original action; and the order that the debt be attached and that the garnishee, that is, the debtor of the original judgment debtor, shall appear to shew cause why he should not pay the debt, does not operate to give the plaintiff in the original action any security until it is served." It is plain that Jessel M.R. means that as soon as the order is served it does give the judgment creditor some security. It does not, it is true, operate as a transfer of the property in the debt, but it is an equitable charge on it, and the garnishee cannot pay the debt to any one but the garnishor without incurring the risk of having to pay it over again to the creditor. That was decided in *Rogers* v. *Whiteley* (2), where a

(1) (1879) 11 Ch. D. 160. (2) [1892] A. C. 118.

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garnishee order nisi which attached all debts owing or accruing due from the garnishee to the judgment debtor was served on the garnishee, who had in his hands as banker moneys belonging to the judgment debtor exceeding the amount of the judgment debt. The judgment debtor having brought an action against the garnishee for refusing to honour cheques which the judgment debtor drew on the balance over and above the amount of the debt, the House of Lords held that the order attached the whole of the moneys in the garnishee's hands and that he was right in dishonouring the cheques. It is plain, therefore, that in this case, although there has been no actual transfer of the debt, there is such a charge on it that the garnishee could not safely hand over the money to the trustee in bankruptcy, for if he did so he would still be liable to the defendants. It is said that the debt is now the property of the plaintiff as the trustee in the bankruptcy of the judgment debtors; but it is property which is subject to a charge, and there is nothing in the Scotch Act which entitles the trustee to receive that property until he has paid off that charge.

For these reasons I am of opinion that judgment on the interpleader issue should be entered for the defendants, and the appeal must, therefore, be allowed.

BUCKLEY L.J. Ridley J. decided this case in favour of the plaintiff on the ground that it was governed by s. 108 of the Bankruptcy (Scotland) Act, 1856. Counsel for the plaintiff disclaims having advanced any argument to that effect, and has not based his argument in this Court on that section. I cannot see that s. 108 applies to the circumstances of this case. The question stands thus. In October, 1908, the defendants obtained a garnishee order nisi in respect of a debt owing in England by the garnishees to the judgment debtors, and the defendants served that order on the garnishees. In November sequestration proceedings against the estate of the judgment debtors were taken in Scotland, and the plaintiff was appointed trustee of the estate, wherever it might be situated. The plaintiff comes to England to collect property forming part of that estate. The question is, what property can he collect? He can go to the garnishees and require them to pay to him the debt which

they owe to the bankrupts. Their answer is that they cannot pay the debt to him because they have been served with the garnishee order nisi, and the plaintiff is not entitled to collect the debt except upon the terms of first paying to the defendants, who had garnished the debt, the sum due to them in respect of their judgment debt. It is true that, if the bankruptcy proceedings had been in England, s. 45 of the Bankruptcy Act, 1883, would have had the effect of defeating the defendants' rights under the garnishee order nisi; but this is not a case of an English bankruptcy, but of a trustee in a Scotch bankruptcy coming to England to collect the bankrupt's property, and s. 45 does not apply to this case. The plaintiff is only entitled to collect this debt subject to his first satisfying the claims of the defendants under the garnishee order nisi.

KENNEDY L.J. I am of the same opinion and I entirely concur with the reasons given by Farwell and Buckley L.JJ. The only thing I desire to say is with regard to *Geisse* v. *Taylor* (1), as I was a party to the decision in that case. Whatever may be the value or correctness of that decision, it has no bearing on the question in this case. The question there was whether a person who had obtained a garnishee order absolute was or was not entitled to succeed on an interpleader issue with regard to a sum of money which had been paid into Court as representing the value of certain goods which had been taken in execution. It was not a case of competing creditors for a debt admittedly due, for the question turned on the rights of the garnishor as against a debenture-holder who had advanced money to the garnishee with notice of the garnishee order absolute. I thought when deciding the case, and still think, that it raised a difficult question, but the decision cannot be treated as an authority in this case.

Appeal allowed.

Solicitors for plaintiff: *Heath & Hamilton.*
Solicitor for defendants: *Julius A. White.*

(1) [1905] 2 K. B. 658.

F. O. R.

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[COURT OF CRIMINAL APPEAL.]

THE KING *v.* TURNER.

Criminal Law—Habitual Criminal—Plea of Guilty to Crime charged in Indictment—Further Charge in Indictment of being Habitual Criminal—Swearing Jury—Evidence of Consent of Director of Public Prosecutions—Evidence of Notice of Intention to insert Charge to Officer of Court and to Prisoner—Length of Notice—Admissibility of Evidence of previous Convictions—Grounds of Charge of being Habitual Criminal—Form of Sentence—Prevention of Crime Act, 1908 (8 *Edw.* 7, *c.* 59), *s.* 10.

An indictment under s. 10 of the Prevention of Crime Act, 1908, charged the prisoner with felony and also with being a habitual criminal. The prisoner pleaded guilty to the felony and not guilty to the charge of being a habitual criminal:—

Held, that upon the inquiry whether the prisoner was a habitual criminal there was no objection to swearing the jury as for the trial of a felony, although it would have been sufficient to swear them as for the trial of a misdemeanour.

Without laying down any general rule as to how the consent (required by s. 10, sub-s. 4 (*a*)) of the Director of Public Prosecutions to a charge of being a habitual criminal being inserted in an indictment ought to be proved, it will be sufficient if some person who has been in correspondence with the Public Prosecutor is called to say that he received the document containing the consent in the ordinary course of correspondence and believes it to be signed by the Director of Public Prosecutions, but it is not necessary to call a witness who has seen him write.

In order to prove that seven days' notice (required by s. 10, sub-s. 4 (*b*)) of the intention to insert in the indictment a charge of being a habitual criminal has been given to the proper officer of the Court it is not necessary that the officer himself (e.g., the clerk of the peace) should be called, but there must be some proof of the receipt by him of the notice, e.g., by calling his clerk.

Notice to produce the notice (required by s. 10, sub-s. 4 (*b*)) to the offender that it is intended to insert the charge of being a habitual criminal in the indictment is not required in order to render secondary evidence of the contents of the notice to the offender admissible.

The seven days' notice to be given to the officer of the Court and to the offender that it is intended to insert a charge of being a habitual criminal in the indictment is seven clear days' notice.

Before the previous convictions mentioned in s. 10, sub-s. 2 (*a*), can be given in evidence in support of the charge of being a habitual criminal, evidence must be given to shew that the previous convictions were specified in the notice to the offender.

It is not necessary that the notice to the offender of intention to insert a charge of being a habitual criminal in the indictment should

contain a statement of the evidence which it is intended to call for the purpose of showing that he is leading persistently a dishonest or criminal life, but the grounds upon which it is intended to prove that he is leading persistently a dishonest or criminal life must be stated in a general way, e.g., that the prisoner is doing no work and has no honest means of livelihood.

Whether evidence of the prisoner's persistently dishonest or criminal life previous to his last conviction is admissible in evidence in order to prove that he is at present leading a persistently dishonest or criminal life depends on the facts of the case. The evidence may be admissible as a step in proving that he is at present leading a persistently dishonest or criminal life.

If the facts make it doubtful whether the prisoner was over sixteen when the first of the three convictions mentioned in s. 10, sub-s. 2 (*a*), took place, some evidence of that fact must be given. But a statement of the prisoner to that effect would be sufficient.

Where a person is convicted of, or pleads guilty to, having committed a crime charged in the indictment, the Court ought not to pass a sentence for that crime before the jury inquire into a further charge, contained in the indictment, of being a habitual criminal.

CASE stated by the chairman of the Court of quarter sessions for the county of Worcester.

Edward Turner was indicted on October 11, 1909, at the Michaelmas quarter sessions for the county of Worcester on an indictment charging him in the first count with feloniously breaking and entering into a shop at Yardley with intent to steal, and stealing certain goods therein, and in the second count with feloniously receiving the goods knowing them to have been stolen.

The indictment then proceeded to charge the prisoner under the Prevention of Crime Act, 1908, in the following terms with being a habitual criminal: "And the jurors aforesaid, upon their oath aforesaid, do further present that the said Edward Turner is a habitual criminal within the meaning of the tenth section of the Prevention of Crime Act, 1908."

On being called upon to plead, he pleaded guilty to the first and second counts. He was then called upon to plead to the charge of being a habitual criminal, and to that he pleaded not guilty.

In these circumstances several questions arose which appear from the following statement contained in the case:—

The first question that arose was as to the procedure on the

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indictment. Sect. 10, sub-s. 4, of the Act states that "the offender shall in the first instance be arraigned on so much only of the indictment as charges the crime, and if on arraignment he pleads guilty or is found guilty by the jury, the jury shall, unless he pleads guilty to being a habitual criminal, be charged to inquire whether he is a habitual criminal, and in that case it shall not be necessary to swear the jury again."

As the prisoner had pleaded guilty to the offence with which he was charged, and no jury had been sworn, and pleaded not guilty to the offence of being a habitual criminal, it became necessary to swear the jury to inquire whether he was a habitual criminal or not. The section merely directs that it shall not be necessary to swear the jury again, but does not state whether if the jury have not been sworn on the previous counts of the indictment they are to be sworn as for a felony or for a misdemeanour. Having regard to the fact that the original indictment was one for felony, the chairman directed the jury to be sworn as in a case of felony. Was that a right direction?

The section proceeds to say that "a charge of being a habitual criminal shall not be inserted in an indictment (*a*) without the consent of the Director of Public Prosecutions; and (*b*) unless not less than seven days' notice has been given to the proper officer of the Court by which the offender is to be tried, and to the offender, that it is intended to insert such a charge; and the notice to the offender shall specify the previous convictions and the other grounds upon which it is intended to found the charge."

The police superintendent was called and proved that a letter from the Public Prosecutor containing a notice for service on the prisoner, and consent for the prisoner to be charged as a habitual criminal, had been received at the chief constable's office. It was proposed to put the consent in evidence. It was objected that this consent was not admissible without the whole letter and contents, and also on the ground that the consent was bad in form as it was not addressed to any one, and not produced by the right officer. The chairman admitted it.

A notice sent by the Public Prosecutor to the clerk of the peace was tendered. It was objected that the officer of the court

who should produce it should be called and sworn and produce the notice sent to him. The chairman admitted the notice without calling the clerk of the peace.

The superintendent was sworn and stated that he served on October 4, 1909, the notice on the prisoner which had been sent down by the Director of Public Prosecutions. There was, however, no copy of this notice, there was no evidence to shew what were the contents of the notice, and as no notice to produce it had been given to the prisoner, the chairman refused to allow secondary evidence to be given of the contents of the notice served.

The superintendent stated that the notice was served on October 4, and the Sessions were held on October 11. The section says that a charge of being a habitual criminal shall not be inserted unless not less than seven days' notice has been given. It was objected that seven days' notice had not been given in this case, and that it ought to be seven clear days. The chairman overruled the objection.

An inspector of the detective department of the Birmingham police produced a conviction dated October 22, 1900, of the prisoner of warehouse-breaking. It was objected that this conviction was inadmissible in evidence as there was nothing to shew that it was one of the convictions which were specified in the notice on which the prosecution relied at the hearing of the charge. The chairman was of opinion that this objection was good, but in order that the practice might be settled he admitted the evidence, and stated that he would give the prisoner every facility to appeal. The same objection was taken as to two other convictions which were proved against the prisoner.

No evidence was offered that any notice had been given to the prisoner of the nature of the evidence the prosecution proposed to call to shew the prisoner was leading persistently a dishonest life. The superintendent of police was called to prove that the prisoner was leading persistently a dishonest or criminal life, and the superintendent stated that the prisoner had done no work except an occasional odd job. It was objected with regard to this that this evidence was not admissible on the ground that nothing could be given in evidence with regard to

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the prisoner's conduct but what had taken place since the last conviction, the words of the Act being "that he is leading persistently a dishonest or criminal life," and that they must refer to the life after the last conviction and not to the life which he led before such conviction. The chairman was of opinion that this view was correct, but considered that the question whether the evidence ought to be admitted should be the subject of appeal to the High Court as to its admissibility. (1)

It was submitted by the defence that there was no case to go to the jury, as the Crown had not proved that the prisoner was more than sixteen when the first conviction took place; that the notice was bad in not specifying the convictions and other grounds to found the charge; that there was no evidence to shew that the prisoner had any opportunity of meeting the case, or of bringing rebutting evidence; that there was nothing in the notice specifying the other grounds upon which it was intended to found the charge; and that the notice was out of time and had not been properly proved. There was no evidence of the age of the prisoner either at the time of his conviction or at the time of his arrest on this charge.

The chairman overruled these objections and left the case to the jury. The jury found the prisoner guilty, and the Court sentenced him to five years' detention as a habitual criminal. He had not appealed, and the time for doing so had now elapsed, and therefore the chairman stated this case for the opinion of the Court.

A further point arose as to whether he ought not to have been sentenced to penal servitude before the indictment for being a habitual criminal was tried. The chairman held that this was not necessary and that both sentences might be pronounced together.

(1) It was agreed during the arguments that the facts bearing upon this question were not quite fully stated. In addition to the evidence mentioned above the prosecution at the trial proposed to prove convictions previous to the last one, which was in 1905, together with that conviction as evidence in support of the charge that the prisoner was leading persistently a dishonest or criminal life. On behalf of the prisoner it was objected that no convictions previous to that in 1905 could be proved for the purpose of shewing the kind of life the prisoner was leading in 1909.

The questions of law for the consideration of the Court were :—

(1.) Was the direction that the jury should be sworn, as in cases of felony, when the charge to which the prisoner had pleaded guilty in the indictment was felony, correct, or how should the jury be sworn?

(2.) Was it necessary that the whole of the letter and all the contents received by the chief constable from the Director of Public Prosecutions should be put in evidence, or could one of the inclosures be put in evidence without the rest? (1)

(3.) Was it necessary that the clerk of the peace should be called and sworn to produce the original notice sent to him by the Public Prosecutor?

(4.) Was the chairman right in refusing to allow secondary evidence to be given of the contents of the notice served upon the prisoner?

(5.) Was the service of the notice on October 4, the sessions being held on October 11, a sufficient notice within s. 10 of the Act?

(6.) Was the conviction dated October 22, 1900, or the other convictions proved admissible in evidence, there being no evidence to shew that they were the convictions mentioned in the notice?

(7.) Was it necessary to prove that notice was given to the prisoner of the evidence to be called to prove he was leading a persistently dishonest or criminal life?

(8.) Was the chairman right in admitting evidence of the prisoner's dishonest or criminal life previous to the last convic-viction, or should the evidence be confined to proving that the prisoner was leading persistently a dishonest or criminal life since his release from prison after his last conviction?

(9.) Was it necessary that evidence should be given to prove that the prisoner was over sixteen when the first conviction took place?

(1) It was agreed during the arguments that the general question upon which the opinion of the Court was desired was as to how the consent of the Director of Public Prosecutions to the insertion in the indictment of a charge of being a habitual criminal ought to be proved, and the Court delivered judgment as if that question had been included among those in the case stated by the chairman of the Court of quarter sessions.

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(10.) Should the sentence on the first counts of the indictment have been given before the prisoner was placed on his trial as a habitual criminal?

If the Court should be of opinion that on any of the above matters the chairman was wrong in the directions he gave, or in admitting the evidence, the conviction was to be quashed; if it was of opinion that in all the above matters the chairman was right, the conviction was to stand.

Hon. R. W. Coventry, for the prisoner. As to question (1.), it is not disputed that the direction that the jury should be sworn as in cases of felony was right. The same point might arise under s. 116 of the Larceny Act, 1861 (24 & 25 Vict. c. 96). Under the Prevention of Crime Act, 1908, the previous crime might be a misdemeanour or a felony, but it is not stated whether being a habitual criminal is a misdemeanour or felony. As the greater must include the less, it must be sufficient if on the inquiry whether the prisoner is a habitual criminal the jury are sworn as in a trial for felony.

Question (2.) does not quite raise the point upon which the opinion of the Court is desired. The real point is whether the consent of the Director of Public Prosecutions can be received in evidence without calling some person who knows the handwriting to prove that it was written or signed by him or the Assistant Director of Public Prosecutions. It was necessary to pass the Evidence Act, 1845 (8 & 9 Vict. c. 113), s. 2, in order that the signatures of judges of the High Court should be taken judicial notice of. It is necessary to prove the written fiat of the Attorney-General authorizing a prosecution by calling his clerk or some person familiar with his signature. *Reg.* v. *Dexter* (1) is distinguishable. In that case there was a motion in arrest of judgment and different considerations might well apply. In the present case the point was taken at the trial. If in *Reg.* v. *Dexter* (1) the objection had been taken at the trial an adjournment might have been granted, and in that way no harm would have been done, but to take it after the verdict of the jury was obviously too late.

(1) (1899) 19 Cox, 360.

As to question (3.), that question refers to the notice to the clerk of the peace that the Director of Public Prosecutions had consented to a charge being inserted against the prisoner in the indictment that he was a habitual criminal. There is no rule of evidence which enables the clerk of the peace to be treated as a privileged person or dispenses with his being called as a witness in the ordinary way. The fact that a person is an officer of the Court does not dispense with the ordinary rules of evidence being observed.

As to question (4.), it was necessary to give notice to the prisoner to produce the notice which was served on him of the intention to insert the charge of being a habitual criminal in the indictment. In the absence of any notice to produce, secondary evidence of the contents of the notice to the prisoner cannot be given.

As to question (5.), there must be seven clear days between the date of the service of the notice and the first day of the sessions: *In re Railway Sleepers Supply Co.* (1)

As to question (6.), the convictions were inadmissible in evidence, as there was nothing to shew they were the convictions mentioned in the notice to the prisoner.

As to questions (7.) and (8.). No convictions before 1905 could be given in evidence for the purpose of shewing what kind of life the prisoner was leading in 1909. The question under s. 10, sub-s. 2 (*a*), is whether the prisoner *is* leading persistently a dishonest or criminal life. That is clear from the language of the sub-section, "that since the age of sixteen years he *has* at least three times . . . . been convicted . . . . and that he *is* leading persistently a dishonest or criminal life." The fact that he has been three times convicted and that after the last of those convictions he continues to lead a dishonest life constitutes a habitual criminal under the Act of 1908. It is possible that there might be a hiatus of ten or more years since the last conviction during which the prisoner might have been doing good work. In those circumstances no conviction previous to the last, nor any evidence as to his mode of life before that conviction, would be admissible to shew his present mode of life.

(1) (1885) 29 Ch. D. 204.

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As to question (9.), the prison calendar was in Court, but there was no admissible evidence of the prisoner's age. It is true that the calendar of prisoners for trial contained a statement that the prisoner was twenty-nine years of age, and the usual practice is, when a person is arrested, to ask him what his age is, but a police constable ought to be called to prove that the prisoner said that his age was that given in the calendar.

As to question (10.), that is entirely a question of procedure to be settled by this Court. [Archbold's Criminal Pleading, 23rd ed. p. 359, was also referred to.]

R. D. Muir and *Graham Milward*, for the prosecution. As to question (1.), it is sufficient to swear the jury as for misdemeanour in all cases. The indictment, which is in the usual form, does not, strictly speaking, contain a separate count for being a habitual criminal. There is a mere allegation to that effect added to the indictment, and no trial upon that allegation involves any question as to whether the prisoner is or is not liable to be convicted of a felony. Unless the issue before the jury may be decided by them in such a way as either to convict or acquit the prisoner of a felony it is clearly unnecessary to swear the jury as for a felony. The issue as to whether the prisoner is a habitual criminal is merely one of fact which the jury have to determine, and it involves no question of either a felony or a misdemeanour. That being so, it is sufficient to swear them as upon the trial of a misdemeanour, and a fortiori the direction of the chairman that they should be sworn as for the trial of a felony was right.

As to question (2.), the proper way to prove the consent of the Director of Public Prosecutions is to call the person who wrote to him to obtain his consent to say in substance, "I wrote a letter to the Director of Public Prosecutions, this is the reply which I got from him to that letter." There would have to be either a knowledge of handwriting acquired by correspondence, or the fact proved that the document came in answer to a communication addressed to the Director of Public Prosecutions.

As to question (3.), the fact that the clerk of the peace hands to the Court the notice of intention to insert the allegation in the indictment that the prisoner is a habitual criminal is prima

facie evidence that he received the notice, and the date upon it is prima facie evidence of the date of service of it by post, in the ordinary course of postal delivery.

As to question (4.), Taylor on Evidence, 10th ed., vol. 1., s. 450, pp. 345, 346, shews that notice to produce the notice served on the prisoner was not necessary, and that, therefore, secondary evidence of it ought to have been admitted.

As to question (5.), there must be seven days from the date of service of the notice on the prisoner and the clerk of the peace to the date on which the bill is found by the grand jury, not seven clear days: *Rex* v. *West Riding of Yorkshire Justices.* (1) The decision in that case shews that the expression "not less than seven days' notice" in s. 10, sub-s. 4 (*b*), of the Prevention of Crime Act, 1908, means excluding the date of service of the notice, but including the date on which the bill is found by the grand jury. The decision in *Rex* v. *Cumberland Justices* (2) is to the same effect.

As to question (6.), no evidence need be given in the first instance of the contents of the notice served on the prisoner. If evidence is given of a conviction which is not mentioned in the notice, it is for the prisoner to take the objection. With regard to the notice everything must be presumed to have been rightly done.

As to question (7.), the notice to the prisoner must specify the convictions, but all that is required beyond that by s. 10, sub-s. 4 (*b*), of the Prevention of Crime Act, 1908, is that "the other grounds" should be specified, i.e., that the notice should state that the prisoner is persistently leading a dishonest life or that he is leading persistently a criminal life; because crime may consist of other matters than dishonesty, e.g., violence.

As to question (8.), whether evidence can be given of the prisoner's dishonest or criminal life previous to his last conviction must depend upon the nature of the case. If it is shewn that there has been a substantial break in the prisoner's dishonest method of life, the judge should either rule that the break is of such a length that there is no evidence to go to the jury of persistency, or, if the break is only small, it would be a

(1) (1833) 1 N. & M. 426. (2) (1835) 4 N. & M. 378.

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question for the jury whether that break is sufficient to constitute an absence of persistency.

As to question (9.), a prisoner when received into prison is asked his age among other questions. The practice of judges sitting in criminal Courts is to accept the information in the calendars which is given by the governors of gaols.

[As to question (10.), the Court intimated that they did not desire to hear any argument.

Archbold's Criminal Pleading, 23rd ed., p. 890, was also referred to.]

Hon. R. W. Coventry in reply. As to the length of the notice to the officer of the Court and the offender required by s. 10, sub-s. 4 (*b*), of the Act of 1908, the decisions in *Rex* v. *West Riding of Yorkshire Justices* (1) and *Rex* v. *Cumberland Justices* (2) are directly in conflict with that in *Railway Sleepers Supply Co.* (3)

The general principle is that where a person has to do an act within a certain number of days he has only that number of days including one and excluding the other, but not that number of clear days. If, however, a person before doing an act has to give an opponent a certain length of notice, the time must be reckoned exclusive of both the first and last day. [Order LXIV., r. 12, of the Rules of the Supreme Court, 1883, was also referred to.]

The judgment of the COURT (Lord Alverstone C.J., Grantham and Channell JJ.) was delivered by

CHANNELL J. It is unfortunate that no provision is contained in the Prevention of Crime Act, 1908, for the mode in which proof is to be given of the various matters with regard to which the opinion of the Court is asked, or that power was not given by the statute to make rules of Court. Rules could then have been made which would have provided for almost all the difficulties which have arisen since the statute came into force. It is the duty of the Court to deal with the Act in its present form, although even now a statute dealing with the subject or a

(1) 1 N. & M. 426. (2) 4 N. & M. 378.
(3) 29 Ch. D. 204.

supplementary Act authorizing rules of Court to be made would remove any difficulty that exists. The duty of the Court, however, is to give the best answers it can to the various questions upon which its opinion is asked.

As to question (1.). The Court is clearly of opinion that there is no objection when the first charge in the indictment against the prisoner is one of felony to the course which was taken in the present case being adopted and the jury being sworn as in a trial for felony. The effect was to give the prisoner challenges; but, although the matter is not one of very great importance, the Court is of opinion that the question before the jury upon the charge of being a habitual criminal does not, in itself, involve an inquiry as to whether he has committed felony, but that it is a mere issue of fact, and that it would be sufficient to swear the jury as for misdemeanour only in any case in which the fact of the prisoner being a habitual criminal has to be proved. There is, however, no objection to swearing the jury as in a trial for felony when the principal charge is felony.

As to question (2.). This question as asked only relates to the facts in this particular case, but it is agreed that it was intended to include in it a much more general proposition. Taking the question as it stands, the Court is of opinion that if the document which was enclosed was produced and proved it was unnecessary to put in the letter with which it was enclosed. That raises the more general question as to how the particular document which was enclosed—i.e., the consent of the Director of Public Prosecutions—ought to be proved. The Court is of opinion that it is necessary to have some evidence by which a document produced and purporting to be signed by the Director of Public Prosecutions should be proved. There is no statute which authorizes a Court of justice to take notice of the signature of the Director of Public Prosecutions. His signature must therefore be proved, but it is not necessary that that proof should be by the evidence of a person who is able to say that he has seen the Public Prosecutor (or the Assistant Public Prosecutor) write, and that the signature to the document is in his handwriting.

In our opinion, without laying down a general rule as to what

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would be necessary in every possible case, it would be sufficient if some person who has been in correspondence with the Director of Public Prosecutions gives evidence to the effect that he received the document in the ordinary course of correspondence and believes it to be signed by the Director of Public Prosecutions. As a general rule, in the country there is a solicitor instructed to conduct the prosecution; sometimes he is an agent of the Public Prosecutor; but in all cases he has to obtain the consent of the Public Prosecutor to the charge of being a habitual criminal being inserted in the indictment, and in our view it is sufficient if he proves that he has been in correspondence with the office of the Public Prosecutor and he has received the document containing the consent in the regular and ordinary course of post and says that to the best of his belief it is a genuine document. In that way the proof can be given in the great majority of cases without much trouble. It might be done in the way suggested by Mr. Muir by proving the writing of a letter requesting the consent of the Public Prosecutor, and that the consent produced was received in answer to that letter. There must be some kind of proof, but it need not be the evidence of a person who is able to say "I have seen the Public Prosecutor write and in that way I know his handwriting."

As to question (3.). The Court is of opinion that it was not necessary that the clerk of the peace should be called, but there must be some proof of the receipt of the notice. The proof may be given by calling an officer of the clerk of the peace, e.g., his clerk, or some person from his office, or by calling the person who served the notice. Service of the notice is a matter to be proved by evidence, it is a fact to be proved by evidence on oath. The notice cannot be treated as one of the records of the Court which could be looked at without proof, as it is a notice to the Court rather than a record of the Court itself, and it must therefore be proved. It must not be forgotten that under s. 10, sub-s. 4 (*b*), of the Prevention of Crime Act, 1908, the date of the receipt of the notice has to be proved, and that is one very important reason why the fact of the receipt has to be proved.

As to question (4.). The Court is of opinion that the chairman was wrong in refusing to allow secondary evidence to be given of

the contents of the notice served upon the prisoner. It is a general rule that notice to produce a notice need not be given. I have always understood that the reason for that rule is that if it were necessary to give notice to produce a notice, notice to produce the notice to produce would have to be given, and so on ad infinitum. But whatever the foundation of the rule may be, the rule itself is perfectly established. We are therefore of opinion that the chairman ought to have received evidence of the contents of the notice served upon the prisoner without the prisoner having had a notice to produce it.

As to question (5.). Sect. 10, sub-s. 4 (*b*), of the Prevention of Crime Act, 1908, provides that "not less than seven days'" notice must be given to the proper officer of the Court and to the offender. The question whether the words "not less than seven days" mean clear days is a troublesome one to answer, as there have been decisions upon similar words which are not exactly in accord. Those decisions depend upon particular statutes, and may therefore all be right and yet bring about apparently conflicting results. We have come to the conclusion that the decision most nearly in point is that in *Chambers* v. *Smith* (1), referred to by Chitty J. in *In re Railway Sleepers Supply Co.* (2), where he reviewed the authorities. In *Chambers* v. *Smith* (1) the words were "not being less than fifteen days," and the Court in the first instance held that what I may call the ordinary rule applied, namely, that where a certain number of days are specified they are to be reckoned exclusive of one of the days and inclusive of the other unless clear days are expressed. But although that is the rule, the difficulty is to ascertain whether clear days are expressed by the language of the particular statute. In *Chambers* v. *Smith* (1) the Court, after having in the first instance thought that the words "not less than fifteen days" were to be construed according to what I have called the ordinary rule, namely, inclusive of one of the days and exclusive of the other, on reconsideration came to the conclusion that they were to be construed as meaning fifteen clear days. The words upon which that decision was based are the nearest to be found in the authorities to those which we have to construe in the present

(1) (1843) 12 M. & W. 2. (2) 29 Ch. D. 204.

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case, and we therefore come to the conclusion that the provision that "not less than seven days'" notice has to be given means "seven clear days'" notice, and we so answer the question. It follows that the notice given was insufficient.

As to question (6.). The difficulty to which this question relates arose in consequence of the chairman of the Court of quarter sessions having excluded secondary evidence of the notice which was served upon the prisoner. The result was that there was before the Court of quarter sessions no evidence as to what convictions were specified in the notice. There was, therefore, no evidence that the conviction of October 22, 1900, or the other convictions which were proved were convictions of which the prisoner had had the requisite notice. The notice to the prisoner is undoubtedly a very important matter, and the provision with regard to it must have been deliberately introduced into the statute for the protection of the prisoner and in order that he may know what convictions it is proposed to prove against him, and to thus give him time, if he alleges that he has not been so convicted, to prepare his defence upon that point.

The question which arises in this particular case does not relate to a matter of general application, but upon the facts of this particular case it is quite clear that those convictions could not be lawfully proved against the prisoner, because there was no evidence that he had had notice that they were going to be so proved.

As to question (7.). Sect. 10, sub-s. 4 (*b*), of the Prevention of Crime Act, 1908, provides that "the notice to the offender shall specify the previous convictions and the other grounds upon which it is intended to found the charge." By sub-s. 2 a person shall not be found to be a habitual criminal unless the jury finds on evidence (*a*) that since attaining the age of sixteen years he has at least three times previously to the conviction of the crime charged in the indictment been convicted of a crime . . . . and that he is leading persistently a dishonest or criminal life; or (*b*) that he has on such a previous conviction been found to be a habitual criminal and sentenced to preventive detention.

The Court is of opinion that there is no obligation to state in the notice to the prisoner the evidence which is to be given to

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prove that he is leading persistently a dishonest or criminal life. But the grounds upon which it is intended to found the charge must be stated in a real and substantial form. It would not be sufficient to say in the notice that it is proposed to prove that the prisoner is leading persistently a dishonest life or that he is leading persistently a criminal life. I am not sure whether the words "a dishonest or criminal life" point to the distinction between a criminal life led by a person who is constantly committing assaults, or some crime not involving dishonesty, and a dishonest life; but, whether that is so or not, in the opinion of the Court it is not sufficient to state in the notice that the prosecution intends to prove that the prisoner is persistently dishonest, or criminal without being dishonest. The grounds upon which it is intended to prove that the prisoner is leading persistently a dishonest or criminal life must be stated in a general way as grounds of proof, but not as evidence: e.g., it would be sufficient to state that the prisoner is a habitual associate of thieves, or that he is doing no work and has no visible means by which he is earning an honest livelihood, or that he is now doing the very same thing that he did years ago and for which he was convicted. If a person committed an offence immediately he obtained his discharge from prison it would, I think, be sufficient for the prosecution to insert in the notice a statement to the effect that "You are charged with being a persistent criminal because the very moment you came out of gaol you committed the fresh offence that you are now charged with." The grounds upon which it is intended to rely must be stated in a general way, and it is not sufficient merely to state in the words of the statute that the prosecution intends to prove that which the statute says must be proved.

As to question (8.). The jury must be satisfied that the prisoner is leading persistently a dishonest or criminal life. Therefore the evidence must shew the kind of life he is leading at the time. But the answer to the general question whether prior events can be inquired into must depend on the facts of each case. The question is somewhat similar to that which arises when it is proposed to prove one offence of a prisoner as evidence that he has committed another offence. There may frequently be cases

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where it may be of great importance that evidence of the prisoner's dishonest or criminal life previous to the last conviction should be given in order to shew that at the present time his conduct is precisely the same as it was when, beyond doubt, he was a habitual criminal. It is therefore impossible to hold as a general proposition that evidence of his dishonest or criminal life previous to his last conviction is inadmissible in evidence. That evidence would not of itself determine the issue, but it may be a step in proving the issue, i.e., in proving that the prisoner is leading persistently a dishonest or criminal life.

As to question (9.). In order that a person may be found to be a habitual criminal it is necessary that the jury should find on evidence that he has previously been convicted three times since he was sixteen years of age. The jury must therefore return their verdict on evidence, but there may be cases in which no doubt can arise. For example, convictions against the prisoner, three in number, may be proved to have all taken place within the last year, and it may be perfectly obvious to everybody that the prisoner is very considerably over sixteen years of age at the time of the inquiry, and, therefore, must have been over sixteen when those convictions took place. There are, therefore, cases in which no difficulty can arise. But at least three previous convictions since the age of sixteen must be proved, and when the prisoner is of an age which makes it doubtful whether he may not have been under the age of sixteen at the date of the first conviction which is alleged against him, some further evidence is necessary; but the fact that the prisoner has stated at a particular time that he is a particular age would be sufficient.

The statement of a prisoner's age in the Court calendar is generally derived from statements made by the prisoner himself. As I understand the practice, the governor of the gaol is responsible for the calendar and the statement of the prisoner's age in the calendar is equivalent to a statement that the prisoner so gave his age, but in all cases where the jury would not be prepared to act upon their own view without evidence it must be proved. If the governor or the gaoler were to give evidence to the effect that "I cannot recollect whether I examined

this man myself, but in the course of our regular procedure the man when he comes into gaol gives his age, and the age in the calendar was given to me as that which he stated it to be," I think that would be sufficient, because the official says that the age mentioned in the calendar is that which was reported to the prison authorities as the prisoner's age by the prisoner himself, and that kind of evidence would be sufficient; but in all cases where the prisoner's appearance is not sufficient to satisfy the jury some kind of evidence must be given.

As to question (10.). The Court is clearly of opinion that the answer is in the negative. The facts which are to be proved on the charge of being a habitual criminal are the same as those with reference to which the Court at a trial always desires information before passing sentence, and it is therefore impossible that the Legislature could have intended that sentence must be passed before those facts are inquired into.

The result is that the conviction of the prisoner as a habitual criminal and the sentence of detention consequent upon it must be quashed. (1)

Conviction of being a habitual criminal and sentence founded upon it quashed. The sentence of penal servitude to stand.

Solicitor for prosecution: *Director of Public Prosecutions.*
Solicitor for prisoner: *Registrar of Court of Criminal Appeal.*

(1) See *The King* v. *Waller*, post, p. 364.

J. E. A.

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Dec. 10.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* WALLER.

Criminal Law—Charge of being a Habitual Criminal—Grounds of Charge—Sufficiency of Notice—Consent of Director of Public Prosecutions—Presumption of—Prevention of Crime Act, 1908 (8 *Edw.* 7, *c.* 59), *s.* 10.

At the trial of an offender on a charge of being a habitual criminal under the Prevention of Crime Act, 1908, the consent of the Director of Public Prosecutions to the insertion of the charge in the indictment, which is required by that Act, will be presumed in the absence of any objection by the offender that no such consent was in fact given.

The requirement of s. 10, sub-s. 4, that the notice to the offender of an intention to insert such a charge in the indictment "shall specify the previous convictions and the other grounds upon which it is intended to found the charge," means that the notice shall specify "the other grounds" if any. It does not mean that the previous convictions may not by themselves be sufficient grounds upon which to found the charge.

Appeal to the Court of Criminal Appeal against a conviction.

At the sessions held at the Old Bailey in November, 1909, the appellant pleaded guilty to having on October 28, 1909, made certain counterfeit coins. The indictment further contained a charge, to which he pleaded not guilty, of being a habitual criminal. On the trial of that charge no formal proof was given of the consent of the Director of Public Prosecutions to the insertion of the charge in the indictment. An inspector of police produced a written consent purporting to be signed by the Director, but no evidence was given of the authenticity of the signature. No objection, however, was taken by the appellant at the trial to the absence of that proof. It was proved that the appellant had been convicted on November 1, 1900, of larceny, and had been sentenced to six months' imprisonment; that on February 12, 1902, he had been convicted of burglary and sentenced to eighteen months' imprisonment; and that on November 16, 1905, he had been convicted of making counterfeit coin, and sentenced to five years' penal servitude. He came out of prison on ticket of leave on July 16, 1909, and in October he was found committing the offence to which he now pleaded

guilty. The notice of intention to charge him with being a habitual criminal which was served on the appellant specified the three previous convictions above mentioned, but did not specify any other grounds on which it was intended to found the charge. The appellant was convicted of being a habitual criminal.

Herman Cohen, for the appellant. Formal proof of the Director's consent was necessary as a condition to the charge being allowed to go before the jury. That consent should have been proved in the manner suggested in *Rex* v. *Turner*. (1) The statutes creating the office of Director of Public Prosecutions do not authorize Courts to take judicial notice of the Director's signature. It has been suggested that the Documentary Evidence Act, 1845 (8 & 9 Vict. c. 113), renders proof of the signature unnecessary. But that Act only dispenses with such proof in cases of official documents which are by statute rendered receivable in evidence, and there is no such statute relating to the Director's consent. Secondly, the notice served on the appellant was bad, for it did not specify "the other grounds" on which it was intended to found the charge of being a habitual criminal. Sect. 10, sub-s. 2, of the Prevention of Crime Act, 1908, provides that a person shall not be convicted of being a habitual criminal unless he has been three times previously convicted and is leading persistently a dishonest or criminal life. That shews that there must be other grounds in addition to the three convictions, and the notice under sub-s. 4 (*b*) must specify what those grounds are.

R. D. Muir and *Beaumont Morice*, for the Crown. It is conceded that the Documentary Evidence Act, 1845, does not apply. But until objection is taken by the prisoner no proof at all of the Director's consent is required, for the Court will assume in the absence of objection that everything is in order and that the conditions precedent to the presenting of the indictment have been performed. Under the Vexatious Indictments Act (22 & 23 Vict. c. 17), s. 1, no indictment for one of the offences there mentioned is to be presented unless certain conditions as to binding over the prosecutor or defendant or obtaining the

(1) Ante, p. 346.

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consent of a judge or of one of the law officers have been satisfied, but in *Knowlden* v. *The Queen* (1) it was held that the fact of those conditions having been satisfied was not a matter which need be proved before the petty jury at the trial; though if the requirements of that Act have not in fact been complied with and the objection is taken at the trial the indictment ought to be quashed and a conviction cannot be supported: *Reg.* v. *Fuidge* (2); *Reg.* v. *Heane*. (3) The analogy between that Act and the Prevention of Crime Act appears to be complete. The notice served on the appellant was sufficient. The Act does not say that the three previous convictions coupled with the principal charge may not be enough by themselves to establish the charge of being a habitual criminal.

Cohen in reply.

The judgment of the COURT (Lord Alverstone C.J., Darling and Phillimore JJ.) was delivered by

LORD ALVERSTONE C.J. In this case, upon the question of proof of the consent of the Director of Public Prosecutions, a point has been raised which was not argued when the recent case of *Rex* v. *Turner* (4) was before the Court, and on consideration we think it right to add to the judgment of the Court which was then delivered by Channell J. The question arises with reference to the proviso in s. 10, sub-s. 4, of the Prevention of Crime Act, 1908: "Provided that a charge of being a habitual criminal shall not be inserted in an indictment (*a*) without the consent of the Director of Public Prosecutions." In *Rex* v. *Turner* (4) we considered the degree of evidence necessary to prove the consent in cases in which proof had to be given. The point which has now been taken is whether prima facie, and in the absence of objection by the prisoner, any evidence of that consent need be given at all at the trial. No doubt the giving of the consent is a condition which must be satisfied in fact, and unless it has in fact been given the indictment ought not to be allowed to go before the grand jury. But how far or under what circumstances that fact need be proved at the trial is a different matter. Under

(1) (1864) 5 B. & S. 532.
(2) (1864) L. & C. 390.
(3) (1864) 33 L. J. (M.C.) 115.
(4) Ante, p. 346.

the Vexatious Indictments Act an indictment charging offences, in respect of which neither the prosecutor has been bound over to prosecute nor the person accused has been committed or bound over to appear and defend, cannot go before the grand jury without the consent of a judge or one of the law officers. But it is the duty of the clerk of assize to satisfy himself before the bill is presented to the grand jury that all the necessary steps preliminary to indictment have been taken, and, unless objection be taken by the prisoner that there was no consent in fact, it is to be presumed that the clerk of assize has discharged his duty in that respect. The case of *Knowlden* v. *The Queen* (1) accordingly establishes that the consent of the judge to an indictment under the Vexatious Indictments Act is not one of the matters which the prosecution is called upon to prove as a part of the case before the petty jury. The principle of that decision equally applies to the consent of the Director of Public Prosecutions under the present Act. If objection is taken by the prisoner the question will arise in each particular case as to the evidence which the Court will require to satisfy itself whether there is any ground for he objection, and then the principle which this Court laid down in *Rex* v. *Turner* (2) as to the way in which the consent may be proved will apply. A further point was argued at the request of the Court as to whether evidence need be given to prove the signature of the Director of Public Prosecutions to the letter stating that a consent had been given, or whether upon the mere production of the letter purporting to be signed by him it would not be admissible under the provisions of the Documentary Evidence Act, 1845 (8 & 9 Vict. c. 113). But counsel on both sides are agreed, and we think they are right, that that Act only applies to cases where there has been some statutory direction that a particular document shall be admissible in evidence if properly authenticated, and there is no such statutory direction here, for there is nothing requiring the consent to be in writing at all.

The other contention raised by Mr. Cohen on behalf of this particular prisoner was that the notice he had received in respect of the charge of being a habitual criminal was not sufficient.

(1) 5 B. & S. 532. (2) Ante, p. 346.

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We have nothing to add to the judgment of the Court on this matter in *Rex* v. *Turner*. (1) The Court there said that if the prosecution intend to rely upon any grounds, other than the three previous convictions, for the purpose of establishing the charge of leading persistently a dishonest or criminal life, those grounds must be stated in the notice. They did not say that the prosecution must state other grounds in the notice whether they intend to rely upon them or not, or that under no circumstances can the three previous convictions be sufficient to establish such a charge. In this case the prosecution did not propose to give in evidence anything except the three convictions, but they proposed to say that having regard to those convictions (for the last of which the prisoner was in 1905 sentenced to five years' penal servitude, so that he was only out of prison a few days before he committed the offence for which he was being tried) there was sufficient evidence to entitle a jury to find that he was leading persistently a dishonest or criminal life. It is plain that in some cases the three convictions coupled with proof before the jury of the particular charge may be quite sufficient. At any rate where the jury have found a man to be a habitual criminal on that evidence it does not entitle the prisoner to have the conviction set aside because there was no other ground stated in the notice. We think this appeal should be dismissed.

Appeal dismissed.

Solicitor for appellant: *Registrar of the Court of Criminal Appeal.*

Solicitor for the Crown: *Director of Public Prosecutions.*

(1) Ante, p. 346.

J. F. C.

[COURT OF CRIMINAL APPEAL.]

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Dec. 17.

THE KING *v.* PORTER.

Criminal Law—Conspiracy — Agreement — Indemnification of Bail — No Wrongful Intent—Act tending to produce a Public Mischief.

An agreement by an accused person to indemnify his bail is illegal in that it tends to produce a public mischief, and the parties to the agreement are, therefore, guilty of the offence of conspiracy, although they may have entered into the agreement without any wrongful intent.

Dictum of Martin B. in *Reg.* v. *Broome*, (1851) 18 L. T. (O.S.) 19, disapproved of.

APPEAL against conviction.

At the Worcestershire Assizes, before Jelf J., the appellant and one Brindley were tried on an indictment for conspiracy.

The fifth count of the indictment, after alleging that proceedings on a charge of felony had been taken against one Clark before justices, and that on May 24, 1909, Clark was committed for trial at the Worcestershire quarter sessions, and that the appellant and Brindley entered into a recognizance each in 50*l.* conditioned for the appearance of Clark at quarter sessions, charged that between April 30 and June 28, 1909, the appellant and Brindley, whilst the charge against Brindley was pending, well knowing the premises, unlawfully did conspire together and with Clark that Clark should indemnify the appellant and Brindley against their liability on their recognizance which the appellant and Brindley had duly entered into as sureties for the attendance of Clark at the next Worcestershire quarter sessions on June 28. The count then set out the overt acts of the appellant and Brindley in pursuance of the conspiracy.

In other counts the same conspiracy was alleged with intent to obstruct and pervert the due course of law and justice at the trial of Clark, and with intent that Clark might evade justice and go unpunished.

Jelf J. told the jury, quoting *Wilson* v. *Strugnell* (1), that a contract to indemnify a bail against his liability was contrary to public policy and therefore illegal, and that if the parties had

(1) (1881) 7 Q. B. D. 548.

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entered into the alleged agreement they were guilty of a criminal conspiracy, even though the jury should find that the alleged intent had not been proved. The learned judge left the following questions to the jury with regard to the appellant:—"Was Porter a party to an agreement with Clark that if Brindley and Porter would go bail for him in 50*l.*, then he would give them 50*l.* each as security so that Brindley and Porter should lose nothing if he absconded?" "If so, was Porter a party to such agreement with Clark with the intention that Clark should abscond?" To the first question the jury answered "Yes," and to the second "No." Jelf J. held that this was a verdict of guilty on the fifth count, and the appellant was bound over in his own recognizance in 20*l.* to come up for judgment if called upon.

Sherwood, for the appellant. The question raised by this appeal is whether the fifth count of the indictment, which merely alleges a conspiracy to indemnify bail, without any averment of an unlawful intent, discloses any offence. In so far as a wrongful intent was alleged in the other counts the jury acquitted the appellant, and, therefore, if the fifth count is bad, the conviction cannot stand. An agreement by an accused person to indemnify his bail is an unlawful agreement only in the sense that it is unenforceable: *Jones* v. *Orchard* (1); *Cripps* v. *Hartnoll* (2); *Herman* v. *Jeuchner* (3); but it has never been held, and it is not the law, that such an agreement is illegal in the sense that the parties to it are, in the absence of any wrongful intent, guilty of a criminal conspiracy. The modern view of bail is that it is simply suretyship, and the acceptance of an indemnity by the bail does not necessarily involve illegality in a criminal sense. In *Reg.* v. *Broome* (4) Martin B. held that it is no objection to persons proposed as bail in a criminal case that they are indemnified by or on behalf of the prisoners, and that decision was acted upon by the Recorder of London in *Rex* v. *Stockwell.* (5)

(1) (1855) 16 C. B. 614.
(2) (1863) 4 B. & S. 414.
(3) (1885) 15 Q. B. D. 561.
(4) 18 L. T. (O.S.) 19.
(5) (1902) 66 J. P. 376.

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Acland, K.C. (*Hon. R. W. Coventry* with him), for the prosecution. An agreement to do an act which tends to produce a public mischief is an illegal agreement, the parties to which are guilty of a criminal conspiracy, even though they may in fact have had no wrongful intent: *Rex* v. *Brailsford.* (1) The question whether any particular act does tend to produce a public mischief is for the Court. Examples of acts which have been held to be acts tending to produce a public mischief are to be found in *Rex* v. *Higgins* (2), soliciting a servant to steal his master's goods; *Rex* v. *Wheatly* (3), using false weights; *Rex* v. *Sterling* (4), plotting to impoverish the excisemen; and *Rex* v. *De Berenger* (5), conspiring to raise the price of the public funds by false rumours. It is difficult to imagine a case which would be more certain to produce a public mischief than the indemnification of bail by an accused person, for there is no lawful purpose for which an indemnification could be given; and Jelf J. rightly directed the jury as a matter of law that an agreement to indemnify bail is an illegal agreement, and that if the appellant had in fact entered into the alleged agreement he was guilty of conspiracy, apart from any question of intent. [He also referred to *Consolidated Exploration and Finance Co.* v. *Musgrave* (6) and *Wilson* v. *Strugnell.* (7)]

[He was stopped.]

Sherwood replied.

The judgment of the COURT (Lord Alverstone C.J., Darling and Phillimore JJ.) was delivered by

LORD ALVERSTONE C.J. In this case the appellant and another man named Brindley were indicted for conspiracy. The indictment contains several counts, but the only one which it is necessary to consider is the fifth, which alleges an unlawful conspiracy by the appellant Brindley and Clark that Clark should indemnify the appellant and Brindley against their liability on their recognizance which they had entered into as sureties for the

(1) [1905] 2 K. B. 730.
(2) (1801) 2 East, 5.
(3) (1761) 2 Burr. 1125.
(4) (1663) 1 Lev. 125.
(5) (1814) 3 M. & S. 67.
(6) [1900] 1 Ch. 37.
(7) 7 Q. B. D. 548.

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appearance of Clark at quarter sessions. This count does not contain any averment of intent, and the question which we have to decide is whether that count, as it stands without any averment of intent, discloses any offence.

It has been clearly established by a series of authorities that an agreement to indemnify bail is one which cannot be enforced. Judgments to this effect were delivered by Stephen J. in *Wilson* v. *Strugnell* (1), by Lord Esher M.R. in *Herman* v. *Jeuchner* (2) and by North J. in *Consolidated Exploration and Finance Co.* v. *Musgrave* (3), and agreeing as we do with those judgments, it is impossible for us to hold that a contract such as this is one which can be enforced. But that is not enough to dispose of the question in this case, for there are many contracts which, though not enforceable, are not contracts so unlawful as to render them the subject of an indictment for conspiracy. This question was very fully discussed in *Rex* v. *Brailsford* (4), and I there pointed out that "it cannot, of course, be maintained that every fraud and cheat constitutes an offence against the criminal law, but the distinction between acts which are merely improper or immoral and those which tend to produce a public mischief has long been recognized"; and after referring to the cases which had been cited in the argument as illustrations of that distinction I went on to say: "Without saying that there cannot be acts upon which an innocent construction might be put or that in some cases it might not be for the jury to find as a fact whether the act was innocent or not, we are clearly of opinion that no such argument can possibly be urged in this case. In criminal as well as in civil cases persons are responsible for the natural consequences of their acts . . . . We are of opinion that it is for the Court to direct the jury as to whether such an act may tend to the public mischief, and that it is not in such a case an issue of fact upon which evidence can be given."

Applying that principle to the present case we have to see whether Jelf J. was right in drawing the conclusion of law on the facts found by the jury that the agreement entered into by the appellant and Brindley with Clark was an agreement to

(1) 7 Q. B. D. 548.
(2) 15 Q. B. D. 561.
(3) [1900] 1 Ch. 37.
(4) [1905] 2 K. B. 730.

do something which tended to produce a public mischief. The findings of the jury were that the appellant was a party to an agreement with Clark that if Brindley and the appellant would go bail for him in 50*l.*, then Clark would give them 50*l.* each as security, so that they should lose nothing if Clark absconded, but that the appellant, in becoming a party to that agreement, did not do so with the intention that Clark should abscond. It has been contended for the appellant that in order that the appellant could be convicted of an indictable offence it was necessary that the jury should have found that the agreement was entered into with intent to obstruct and pervert the course of justice, and that, although there are counts in the indictment which contain averments to that effect, as the appellant was convicted on the fifth count also, which contains no such averment, the conviction cannot stand. It is, in our opinion, difficult to conceive any act more likely to tend to produce a public mischief than that which was done in this case. It is to the interest of the public that criminals should be brought to justice, and, therefore, that it should be made as difficult as possible for a criminal to abscond; and for many years it has been held that not only are bail responsible on their recognizance for the due appearance of the person charged, but that, if it comes to their knowledge that he is about to abscond, they should at once inform the police of the fact. It has been suggested to us that the more modern view of bail is that it is a mere contract of suretyship, and that an agreement to indemnify bail, therefore, does not involve any illegality. If that were so, as soon as the bail had got his indemnity, he would have no interest whatever in seeing that the accused person was forthcoming to take his trial, and it is obvious that criminals, particularly if possessed of means, would very frequently abscond from justice. We have been asked to follow the opinion expressed by Martin B. in *Reg.* v. *Broome* (1) that there is no objection to the indemnification of bail, which opinion was acted on by the Recorder of London in *Rex* v. *Stockwell.* (2) It is sufficient to say that we do not agree with the opinion of Martin B.

(1) 18 L. T. (O.S.) 19. (2) 66 J. P. 376.

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In these circumstances we are of opinion that Jelf J. rightly held that the agreement entered into by the appellant was an illegal contract, not only in the sense of being unenforceable, but also as being one which clearly tended to produce a public mischief, and that it amounted to a criminal conspiracy, without any necessity for a finding by the jury that there was an intent to pervert or obstruct the course of justice. The conviction was, therefore, a good conviction on the fifth count of the indictment, and the appeal consequently fails.

Appeal dismissed.

Solicitors for appellant: *Blewitt & Co., Birmingham.*
Solicitor for prosecution: *Director of Public Prosecutions.*

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CLISSOLD *v.* CRATCHLEY AND ANOTHER.

Sheriff—Execution Creditor—Wrongful Seizure—Indorsement on Writ of fi. fa. —Debt paid before Writ issued—Absence of Malice—Action of Trespass.

A solicitor, who had an office in London with a branch office in the country, sued out in London a writ of fi. fa. upon a judgment recovered by his client against the plaintiff in the High Court, and indorsed the writ, in accordance with Order XLII., r. 16, of the Rules of the Supreme Court, 1883, with a direction to the sheriff to levy the amount of the debt. The debt had in fact been paid at the solicitor's country office on the same day as and shortly before the writ of fi. fa. was sued out. Neither the solicitor nor his client knew of the payment of the debt. Execution having been levied on the plaintiff's goods, the solicitor was then informed that the debt had been paid, and he withdrew the execution. In an action against the solicitor and his client on the case to recover damages for improperly levying execution, and in the alternative for trespass, it was found that neither the client nor the solicitor who sued out the writ acted maliciously:—

Held, that the defendants were not liable in trespass, nor in the absence of malice were they liable in an action on the case.

APPEAL from the county court of Gloucestershire holden at Stroud.

The action was brought to recover damages for improperly levying an execution, and alternatively for trespass. The plaintiff was a farmer in Gloucestershire, and the defendants were Mrs.

Cratchley, who resided in Gloucestershire, and H. P. Richards, a solicitor. Litigation had taken place in the Stroud County Court of Gloucestershire between the plaintiff and the defendant Mrs. Cratchley, and in that litigation the defendant Richards acted as Mrs. Cratchley's solicitor. In the course of that litigation an order was made in the Stroud County Court in 1908 appointing a receiver of certain property of Mrs. Cratchley, and directing the receiver to sell the property, which was subject to a mortgage, with the consent of the mortgagees. Thereupon a writ of prohibition was, upon the application of Mrs. Cratchley, obtained in the High Court upon the ground that the order was ultra vires, and the plaintiff was ordered to pay the costs of the prohibition proceedings. The defendant Richards, who had an office in London with a branch office at Stroud, acted as Mrs. Cratchley's solicitor in the prohibition proceedings. J. L. Norris, of Stroud, acted as solicitor for the plaintiff, and his agents in London, Messrs. Walker & Rowe, acted for him in the matter of the prohibition proceedings. Mrs. Cratchley's costs of the prohibition proceedings were taxed in the High Court at 27*l.* 12*s.* 4*d.*, and the time for carrying in objections to the taxation expired on December 14. No objections were carried in, and the certificate of the taxing Master was given. On December 15 Richards, who was in London, wrote to Messrs. Walker & Rowe requesting payment of the above-mentioned sum of 27*l.* 12*s.* 4*d.* before 11 A.M. on the next day, December 16. At about noon on December 16 Norris went to Richards' office at Stroud and paid the 27*l.* 12*s.* 4*d.* on behalf of the plaintiff to one Greening, Richards' managing clerk, and Greening gave Norris a receipt for the money, signing it "H. Powell Richards, p.p. B. J. Greening." Greening did not write to Richards, who was in London on that day, to tell him of the receipt of the money. On the same day (December 16) Richards, who was not informed of the above payment until the afternoon of December 17, inquired of Messrs. Walker & Rowe whether a cheque for the taxed costs had been received, and upon being informed that it had not he told them that he would wait until 2 P.M., and if the money was not then paid he would issue execution. Richards, having received no further communication from them, took out a writ

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of fi. fa. at 3.45 P.M. on that day (December 16), and on December 17 the sheriff's officer levied execution on the plaintiff's goods at his farm. Greening was communicated with, and he telegraphed to Richards in London, telling him of the payment, and on the following day Richards telegraphed to the sheriff to withdraw from possession immediately, and this was accordingly done. Richards in his evidence stated that he never gave Greening any authority to receive the money.

The county court judge found as facts that the taxed costs of the prohibition proceedings were paid to and accepted by Richards' clerk in Stroud some three hours before the writ of fi. fa. was issued in London, twenty-four hours before the levy was made, and forty-eight hours before the sheriff withdrew. He came to the conclusion upon the evidence that there was no sufficient proof that either of the defendants had acted maliciously; that in the special circumstances payment was rightly made at Richards' Stroud office, and that Greening had at least implied authority to receive it and to give a valid receipt for it; and he held that the defendants were liable, and he gave judgment for the plaintiff for 15*l.* damages.

The defendants appealed.

W. G. Hawtin, for the defendants. Greening, having no express instructions to receive the money, had no implied authority to accept payment of the debt: *Whyte* v. *Nutting*. (1) The costs were taxed in London, and the defendant Richards, who was in London, and the London agents of the plaintiff's solicitor were acting in the matter of the taxation. The payment ought therefore to have been made at Richards' office in London and not to his clerk at Stroud, and, there having been no payment to the proper person, the writ of fi. fa. was properly issued.

Next, if Greening had authority to receive payment of the debt, an action on the case for improperly levying execution will not lie in the absence of malice. The county court judge has found that there was no malice on the part of the defendants. It is clear law that, where a writ of execution is sued out before the judgment debt is paid, and afterwards the debt is paid, but

(1) [1897] 2 I. R. 241.

the judgment creditor or his solicitor neglects to countermand the writ, an action will not lie unless malice is proved. This rule applied to the old writs of capias ad satisfaciendum and capias ad respondendum: *Scheibel* v. *Fairbairn* (1); *Page* v. *Wiple* (2); *De Medina* v. *Grove* (3); and also applies to a writ of fi. fa.: *De Medina* v. *Grove* (3); *Phillips* v. *General Omnibus Co.* (4) In *Gibson* v. *Chaters* (5) that rule of law was applied to a case where the writ of capias was taken out after payment of the debt. If, however, there is no proper judgment or record to support or warrant the writ of execution, and the writ is therefore irregular and void, an action of trespass will lie: *Barker* v. *Braham* (6); *Bates* v. *Pilling* (7); and in such an action it is not necessary to prove malice. Here, however, the judgment or order of the Court upon which the writ of fi. fa. was founded was perfectly regular, and the claim for trespass is not maintainable. The only possible cause of action is on the case, and that is not maintainable without proof of malice. The judgment of the county court judge was therefore wrong.

H. M. Sturges, for the plaintiff. There was evidence upon which the county court judge could find that Greening had implied authority to receive payment of the debt: *Finch* v. *Boning*. (8) With regard to the main question, the defendants are liable in trespass, and it is not necessary to prove malice. It is admitted that, if the only cause of action is on the case for improperly levying execution, it is necessary to prove malice, and the county court judge has found that no malice is proved. The principle is that if a regular writ of execution is sued out, and some mistake occurs afterwards, an action will not lie unless malice is shewn in the defendant failing to take steps to set the mistake right. But if a person sues out a writ of execution at a time when no writ could properly be taken out, the writ is irregular and void ab initio, and if execution is levied under it, the person who sued out the writ becomes a trespasser: Addison on Torts, 8th ed., p. 69. He has sued out a writ without

(1) (1799) 1 Bos. & P. 388.
(2) (1803) 3 East, 314.
(3) (1847) 10 Q. B. 152, 172.
(4) (1880) 50 L. J. (Q.B.) 112.
(5) (1800) 2 Bos. & P. 129.
(6) (1773) 3 Wils. 368.
(7) (1826) 6 B. & C. 38.
(8) (1879) 4 C. P. D. 143.

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justification or legal excuse and is guilty of a trespass, and malice is not an ingredient in that action. There was no justification here for the issue of the writ of fi. fa. because the debt had been paid. By the combined effect of Order XLII., rr. 12, 13, and 16, of the Rules of the Supreme Court, 1883, and Form 1 in Appendix H, a person suing out a writ of fi. fa. must indorse thereon a direction to the sheriff to levy the amount really due and payable under the judgment or order. That statement is a direction to the sheriff to levy execution for the unpaid debt. Here the defendant Richards indorsed upon the writ of fi. fa. a direction to the sheriff to levy for 27*l.* 12*s.* 4*d.*, the amount of the debt, and as that was a non-existing debt, the solicitor who gave the direction and his client are both liable in trespass: *Rowles* v. *Senior* (1); *Morris* v. *Salberg* (2); *Lee* v. *Rumilly* (3); *Parsons* v. *Loyd* (4); *Barker* v. *Braham* (5); *Codrington* v. *Lloyd.* (6) It does not follow that the sheriff is liable, because he may plead the exigency of the writ as a justification of his act: *Parsons* v. *Loyd* (7); *Barker* v. *Braham.* (8) In *Gibson* v. *Chaters* (9), at the time when the defendant made the affidavit of debt, which may be likened to the indorsement on the writ under the present practice, and upon which the original writ was issued, the debt was unpaid, and the writ was therefore properly sued out; and the alias writ which was subsequently issued was merely copied from the original writ. The distinction, as was pointed out in *Page* v. *Wiple* (10) and *Bates* v. *Pilling* (11), is between mere passive conduct in not putting right a mistake made in executing a writ regularly issued, and an active act, such as directing the sheriff to seize goods for a judgment debt which has been paid. The defendant Richards here directed the sheriff to levy for a debt which was not due, and so committed an active act, and therefore both the defendants are liable as trespassers.

W. G. Hawtin was not called upon to reply.

(1) (1846) 8 Q. B. 677.
(2) (1889) 22 Q. B. D. 614.
(3) (1891) 7 Times L. R. 303.
(4) (1772) 3 Wils. 341.
(5) 3 Wils. 368.
(6) (1838) 8 A. & E. 449.
(7) 3 Wils. at p. 345.
(8) 3 Wils. at p. 376.
(9) 2 Bos. & P. 129.
(10) 3 East, 314.
(11) 6 B. & C. 38.

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DARLING J. In this case a debt for 27*l.* 12*s.* 4*d.* for taxed costs was due from the plaintiff to one of the defendants, Mrs. Cratchley, in respect of certain prohibition proceedings in London, the other defendant, Richards, being a solicitor, who had acted for her in the litigation. Richards was a solicitor in London with a branch office at Stroud, at which latter office a managing clerk named Greening was employed by him. The county court judge has found that Greening had authority to receive the money brought to him in payment of the debt. There was, in my opinion, evidence upon which the judge was entitled so to find. Greening received the money and gave a receipt for it. After the money had been so paid, Richards in London sued out a writ of fi. fa., and it was sent to the sheriff of Gloucestershire to levy execution upon the plaintiff's goods. The county court judge found as facts that the taxed costs of the prohibition proceedings were paid to and accepted by the defendant Richards' clerk in Stroud some three hours before the writ of fi. fa. was issued in London, twenty-four hours before the levy was made, and forty-eight hours before the sheriff withdrew.

Upon these facts an action is brought by the plaintiff against the two defendants, and it is contended that they are liable inasmuch as the debt was paid before the writ of fi. fa. was issued, and that therefore the writ was irregular and void. Many authorities have been referred to which seem to me to establish this, that an action on the case will not lie against a person suing out a writ after the debt has been paid unless malice on his part is proved. In *Scheibel* v. *Fairbairn* (1), which was decided in 1799, it was held that an action on the case would not lie against a person who sued out a writ of capias ad respondendum before the debt was paid, if he failed to countermand it after the debt had been paid, unless malice was proved. In that and several other cases the writ was issued before the debt was paid; but in 1800 the case of *Gibson* v. *Chaters* (2) was decided, where the writ of alias capias was sued out after the debt had been paid, and therefore the principle of that case covers the point which I am now considering. The facts

(1) 1 Bos. & P. 388. (2) 2 Bos. & P. 129.

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in that case were these: Some matters in difference between the plaintiff, who was the master of a ship, and the defendant, who was the owner, both being resident at North Shields, were referred to arbitration, and an award was made in November, 1797, that the plaintiff should pay 19*l.* 14*s.* to the defendant. The plaintiff was at that time absent from home, and did not return until March, 1799. In December, 1798, the defendant in London made an affidavit of debt to hold the plaintiff to bail, and a writ issued thereupon. Upon the plaintiff's return to North Shields in March, 1799, he heard of the defendant's intention to arrest him, and paid the debt to the defendant's agent at North Shields and took a receipt for the amount. In May, 1799, the plaintiff arrived in the Thames from North Shields, and was arrested and holden to bail by the defendant's attorney upon an alias writ taken out at that time, but grounded on the affidavit made by the defendant in 1798. Those being the facts in that case, I do not see, as I shall point out later on, how it is possible to distinguish them from those in the present case. The argument of Serjeant Best in moving for a rule to set aside the nonsuit was that "the case was distinguishable from that of *Scheibel* v. *Fairbairn* (1), the writ on which the plaintiff in that case was arrested having been sued out previous to the time when the debt was paid, whereas the writ in the present instance was actually taken out after the debt had been discharged and the receipt given; that the ground of complaint in *Scheibel* v. *Fairbairn* (1) was a mere nonfeasance in the defendant, who had omitted to countermand a writ previously sued out, and was so treated by the Court, but that this was a malfeasance and came expressly within the rule laid down in *Waterer* v. *Freeman* (2) that a man is liable to an action if he sue against his release, or after the debt duly paid." The Court overruled that contention and held that to entitle the plaintiff to recover he must prove actual malice, and none was proved. It is worth while turning to the case of *Waterer* v. *Freeman* (2), because one sees there the earlier stage of the principle applicable to this case. Hobart C.J. in delivering the judgment of the Court said: "But now to the main point, we hold that if a man bring an action upon a false surmise in a proper Court, he cannot

(1) 1 Bos. & P. 388. (2) (1619) Hob. 205, 266.

bring an action against him and charge him with it as a fault directly, and ex diametro, as if the suit itself were a wrongful act, for executio juris non habet injuriam. And as all by nature is good, so Saint Paul saith, the law is good if a man use it lawfully; so the abuse of law is the fault." And later on in the judgment the passage occurs which was cited by Serjeant Best in his argument in *Gibson* v. *Chaters* (1): "Likewise I hold that I may have an action upon the case against him that sues me against his release, or after the money duly paid; yea, though it be upon a single obligation."

It is contended on behalf of the defendants, upon the authority of the above cases, that the suing out of the writ of fi. fa. will not give rise to an action on the case unless express malice is proved. That was, as I have said, decided in the cases to which we have been referred, and indeed it was admitted by the plaintiff's counsel. It is contended, however, that the plaintiff is entitled to maintain an action of trespass. That contention is based upon this, that Richards indorsed upon the writ of fi. fa. a direction to the sheriff to levy the amount specified therein as being due and payable, whereas in fact it was not then due and payable, and that such direction to the sheriff to levy execution when no debt existed made Richards, who gave the direction, and his client trespassers. I was at first rather captivated by that argument, and thought that the plaintiff might perhaps maintain an action of trespass, but I have upon further reflection come to the conclusion that, before he can do so, he must distinguish the present case from *Gibson* v. *Chaters*. (1) I do not think that he has succeeded in distinguishing that case. It was said that that case was distinguishable by reason of the fact that the affidavit of the defendant upon which the writ was issued was made before the debt was paid. That is true, but the affidavit was not the ground of the action. The ground of the action was this, that the affidavit having been made by the defendant while the debt was unpaid and a writ of capias having been issued upon it, inasmuch as that writ could not be executed, afterwards when the debt had been paid an alias writ was taken out by the defendant's

(1) 2 Bos. & P. 129.

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attorney grounded upon the former affidavit, and the plaintiff was arrested under this latter writ. It was not the making of the affidavit, but the issue of the alias writ which caused the plaintiff to be arrested. In the present case Richards has done nothing more than was done by the defendant's attorney in that case. Richards by mistake, thinking that the debt of 27*l.* 12*s.* 4*d.* had not been paid, sued out a writ of fi. fa., indorsing upon the writ a statement that the debt was due and payable in order to entitle him to have the writ issued. So too the attorney in the case of *Gibson* v. *Chaters* (1) could not have taken out the alias writ unless he had stated that the debt was unpaid. Therefore, unless Gibson was entitled to maintain an action of trespass against Chaters, this action will not lie against the present defendants. It was not suggested in *Gibson* v. *Chaters* (1) that an action of trespass would lie if the action on the case was not maintainable. Therefore I am of opinion that that case is not distinguishable and that the plaintiff cannot maintain this action for trespass. For these reasons I have come to the conclusion that the county court judge was right in saying that Greening was the agent of Richards authorized to receive the money, but that he was wrong in holding that an action of trespass would lie against the defendants. The appeal should therefore be allowed, and judgment must be entered for the defendants.

PHILLIMORE J. I am of the same opinion. The county court judge has found upon the evidence before him that the payment of the debt was made some three hours before the writ of fi. fa. was issued in London. I take that fact as established. Execution having been levied, the plaintiff brought this action against Mrs. Cratchley and her solicitor to recover damages for having improperly issued the writ of fi. fa. and levied an execution thereunder, and in the alternative for trespass. As to the first cause of action, if the writ was sued out maliciously, clearly the action is maintainable. But there was, as the county court judge has found, no proof of malice. The question therefore is whether an action lies against the defendants or either of them where

(1) 2 Bos. & P. 129.

there is a regular judgment, and where the solicitor sues out a writ of execution, which is the ordinary and regular consequence of the judgment, after the judgment debt has been paid. If the solicitor did it knowing that the debt had been paid, most probably the tribunal which tried the case would find that he did it maliciously, and an action on the case would lie. If he did not do it knowingly, he would probably be found not to have done it maliciously, and in my opinion no action would lie. Solicitors practise in every town in England, and payment may in many cases properly be made at a solicitor's office in a remote part of England. For instance, payment of a judgment debt may be made to a solicitor in Cumberland at five minutes to 4 o'clock in the afternoon, and a telegram stating that fact is sent by the solicitor to his London agents, and it arrives shortly after the central office is closed. The answer comes back that the writ of execution was issued in London just before the office closed. According to the argument of counsel for the plaintiff, both the solicitor and his client would be liable in trespass if execution were levied under that writ. If that is so to-day, it was also true a hundred years ago. At that time the journey from Carlisle to London would have taken two or perhaps three days, and letters took that time to reach their destination. If at that date a writ of execution was taken out in good faith in London upon a regular judgment, though after the debt had been paid in Cumberland, the cases shew that no action would have been maintainable. The law is still the same though the means of communication are now much more rapid. The authorities are clear upon the point. All the cases of the kind are actions on the case, and it has been laid down that malice must be averred and proved. If it were trespass, no proof of malice would be necessary. The case of *Gibson* v. *Chaters* (1) is one which requires some attention with regard to the old procedure. In those days debtors could be arrested on mesne process, and when the writ of capias ad respondendum was obtained there had to be an affidavit of debt to hold the debtor to bail. The facts of that case have been fully stated by my brother Darling and it is not necessary to repeat them in detail. To the first writ of capias in that case

(1) 2 Bos. & P. 129.

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the sheriff presumably returned non est inventus, and subsequently an alias capias was taken out and the plaintiff on arrival in the Thames was arrested and held to bail by the defendant's attorney, the alias writ being grounded upon the affidavit made by the defendant when the first writ was issued. The taking out of the alias writ was improper because at that time the debt had been paid. The plaintiff thereupon brought an action on the case for maliciously and without any just or probable cause arresting him, and he failed upon the ground that proof of actual malice was necessary, and that no such proof had been given, there being no inference of malice from the mere fact that the alias writ was taken out after the debt had been paid. In *Barker* v. *Braham* (1) the action was for trespass, and the client and her attorney were held liable for suing out an illegal writ of capias ad satisfaciendum and causing the plaintiff to be imprisoned thereupon. Where the writ is irregular and void, that is, where the judgment does not support it, trespass lies, though, as was pointed out in that case (2), the sheriff or his officer or any one acting under his authority may justify himself by pleading the writ because that is sufficient for his excuse. In that case the matter is made quite clear. There the late husband of the plaintiff was at the time of his death indebted to the defendant Mrs. Braham upon a bond in the sum of 400*l*. The plaintiff took out letters of administration to her husband, and Mrs. Braham employed her co-defendant Norwood as her attorney to bring an action of debt upon the bond in the King's Bench against the plaintiff as administratrix to her husband, and obtained judgment by default for want of a plea against the plaintiff, whereby it was ordered that Braham should recover against the plaintiff the sum of 400*l*. and so much for damages (or costs) to be levied of the goods and chattels of the plaintiff's late husband in the hands of the plaintiff to be administered, if she had so much in her hands to be administered, and if she had not, then the damages (or costs) only to be levied upon the proper goods and chattels of the plaintiff. Norwood sued out a fi. fa. against the plaintiff, and the sheriff levied 164*l*. of the goods and chattels of the plaintiff's late

(1) 3 Wils. 368. (2) Ibid. at p. 376.

husband in her hands, and returned that the plaintiff had no other goods of his in her hands to be administered. Afterwards Norwood sued out a writ of capias against the plaintiff for the residue of the debt and damages, and gave the sheriff orders to arrest her in execution. The sheriff arrested her, but the writ of capias was set aside, it not being suggested that the plaintiff had been guilty of a devastavit, and she therefore, being only liable as administratrix, had been imprisoned contrary to law. In an action against Mrs. Braham and Norwood, her attorney, the Court held that there was no record to warrant a writ of capias being taken out against the plaintiff, and that therefore the writ was illegally issued, and both the defendants were liable in trespass. There the writ was totally void, and consequently trespass lay. I do not stay to consider whether the suggestion thrown out in that case that the sheriff could in such a case escape liability is well founded or not. In the present case there was a regular judgment to warrant the issue of the writ of fi. fa. Upon the authorities I am of opinion that the defendants are entitled to judgment.

Appeal allowed.

Solicitors for plaintiff: *Walker & Rowe, for J. Lapage Norris, Stroud.*

Solicitor for defendants: *H. Powell Richards.*

W. F. B.

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Dec. 14.

KEATES *v.* LEWIS MERTHYR CONSOLIDATED COLLIERIES, LIMITED.

Master and Servant—Dispute between Employer and Workman—Subsisting Claims—Power of Court of Summary Jurisdiction to adjust and set off—Claim by Employer to have Damages for Breach of Contract by Workman set off against Wages due to Workman—Employers and Workmen Act, 1875 (38 & 39 *Vict. c.* 90), *s.* 3, *sub-s.* 1; *s.* 4.

An employer preferred a summons against a workman under the Employers and Workmen Act, 1875, claiming damages for the workman's breach of contract in having wrongfully absented himself from the service of the employer. The workman contested the claim.

The employer further claimed that the wages earned by and due to the workman might be ascertained, and that the respective claims for damages and wages might be adjusted and set off by the Court.

At the time the summons was heard a certain sum was due to the workman for wages under his contract, but the workman did not claim his wages in the proceedings and contended that the magistrate had no jurisdiction to set off the damages against the wages:—

Held, by Lord Alverstone C.J. and Ridley J. (Darling J. dissenting), that although the workman did not put forward a claim to his wages, the fact that he disputed both claims of the employer constituted "disputes between the employer and workman arising out of their relation as such" and that there were "claims on the part . . . . of the employer" and "on the part . . . . of the workman" respectively which the magistrate had jurisdiction to adjust and set off under ss. 3 and 4 of the Employers and Workmen Act, 1875.

Case stated by the stipendiary magistrate for the petty sessional division of Pontypridd.

At a Court of summary jurisdiction sitting at Porth a summons was preferred by the Lewis Merthyr Consolidated Collieries, Limited (the respondents), against Henry Keates (the appellant) under the Employers and Workmen Act, 1875, claiming damages for the appellant's breach of contract, and further claiming that the wages earned by and due to the appellant from the respondents be ascertained, and that the respective claims for damages and wages be adjusted and set off by the Court.

The following were the particulars of the respondents' claim: "The plaintiffs claim against the defendant the sum of 5*s.* 11*d.* for damages for breach of contract, the defendant having

wrongfully absented himself from the service of the plaintiffs at their Bertie pit on the 30th day of April, 1909.

"The plaintiffs further claim that the wages earned by and due to the defendant from the plaintiffs be ascertained, and that the said respective claims for damages and wages be adjusted and set off by the Court."

The claim for damages for breach of contract arose from the fact that the appellant, together with the rest of the underground workmen working at the respondents' colliery, absented themselves from work without leave, whereby the working of the colliery on April 30, 1909, was stopped for the day. The summons was issued on May 18, 1909, and the case was heard on August 19, 1909, and the magistrate found that there had been a breach of contract by the appellant and awarded the respondents 5*s.* 9*d.* damages in respect thereof and 5*s.* 6*d.* costs. The solicitor appearing for the respondents requested, in accordance with the particulars of claim, that the wages earned by and due to the appellant from the respondents should be ascertained, and that the respective claims for damages and wages should be adjusted and set off by the Court. He also contended that the respondents were entitled to have this adjustment and set-off made by reason of s. 3, sub-s. 1, and s. 4 of the Employers and Workmen Act, 1875.(1) The solicitor for the appellant contended that there was no claim on the part of the appellant before the Court; that

(1) Employers and Workmen Act, 1875, s. 3: "In any proceeding before a county court in relation to any dispute between an employer and a workman arising out of or incidental to their relation as such (which dispute is hereinafter referred to as a dispute under this Act) the court may, in addition to any jurisdiction it might have exercised if this Act had not passed, exercise all or any of the following powers; that is to say,

"(1.) It may adjust and set off the one against the other all such claims on the part either of the employer or of the workman, arising out of or incidental to the relation between them, as the court may find to be subsisting, whether such claims are liquidated or unliquidated, and are for wages, damages, or otherwise; . . . ."

Sect. 4: "A dispute under this Act between an employer and a workman may be heard and determined by a court of summary jurisdiction, and such court, for the purposes of this Act, shall be deemed to be a court of civil jurisdiction, and in a proceeding in relation to any

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no claim had in fact been made by the appellant at any time before the proceedings were taken before the magistrate or before August 19, 1909; that the appellant had no claim within the meaning of the Employers and Workmen Act, 1875, and the rules under it; and that the magistrate had no jurisdiction to comply with the request made by the respondents' solicitor. The magistrate held that he had jurisdiction, and made the following order: "It is this day adjudged that the plaintiff company recover against the defendant the sum of 5*s.* 9*d.* for damages and the sum of 5*s.* 6*d.* for their costs, and this Court having found that the plaintiff company are indebted to the defendant in the sum of 1*l.* 15*s.* 8*d.* for balance of wages, it is ordered that the said sums of 5*s.* 9*d.* and 5*s.* 6*d.*, making together the sum of 11*s.* 3*d.*, be set off against the said sum of 1*l.* 15*s.* 8*d.*, and that the balance remaining after such set off, namely, the sum of 1*l.* 4*s.* 5*d.*, be paid by the plaintiff company to the defendant."

Evidence was called before him, and in the result he found as a fact that, after making certain authorized deductions, a sum of money amounting to 1*l.* 15*s.* 8*d.* had (after the institution of the proceedings before him) been earned by and was due to the appellant under his contract, and that that sum was payable by the respondents to him upon the following Saturday, August 21. It was the practice at the respondents' colliery to pay the workmen at the end of each fortnight, payment being made on alternate Saturdays for the work done by the workmen during the fortnight ending a week previously—that is to say, on the Saturday next preceding the pay day. On the afternoon

such dispute the court may order payment of any sum which it may find to be due as wages, or damages, or otherwise, and may exercise all or any of the powers by this Act conferred on a county court: Provided that in any proceeding in relation to any such dispute the court of summary jurisdiction—

"(1.) Shall not exercise any jurisdiction where the amount claimed exceeds ten pounds; and

"(2.) Shall not make an order for the payment of any sum exceeding ten pounds, exclusive of the costs incurred in the case; and

"(3.) Shall not require security to an amount exceeding ten pounds from any defendant or his surety or sureties."

immediately preceding pay day there would be given to each workman a ticket shewing the amount of and the manner in which his wages for the fortnight ending the previous Saturday were made up, and on presenting his ticket on the following day at the company's pay office the workman would be paid the amount of wages shown thereon. A pay ticket was produced and put in by the respondents shewing the manner in which the sum of 1*l.* 15*s.* 8*d.* was made up, but the ticket had not been delivered to the appellant, nor would it have been delivered to him in the ordinary course of events until Friday afternoon then next, August 20, nor did the appellant know the exact sum which would be payable to him by the respondents on Saturday, August 21, when in the ordinary course he would have been paid the sum due. In accordance with the usual practice, no request or application for payment of the sum in question had been made by the appellant before August 19. The magistrate accepted the contention of the respondents that their indebtedness in the sum of 1*l.* 15*s.* 8*d.* to the appellant constituted a claim of the appellant within the meaning of s. 3, sub-s. 1, of the Employers and Workmen Act, 1875, and held that he had no discretion in the matter, but was bound to set off the costs and damages he had awarded to the respondents against the sum of 1*l.* 15*s.* 8*d.* The questions for the opinion of the Court were: (1.) Had the magistrate jurisdiction to make the adjustment and set-off in the above circumstances? (2.) Was the sum of 1*l.* 15*s.* 8*d.* a claim by the appellants, or, alternatively, was it a claim within the meaning of s. 3, sub-s. 1, of the Employers and Workmen Act, 1875, and the rules made thereunder? (3.) If he had jurisdiction, was he bound to set off the damages and costs against the sum of 1*l.* 15*s.* 8*d.*, or had he an absolute discretion in the matter?

Rufus Isaacs, K.C., *John Sankey, K.C.*, and *Clive Lawrence*, for the appellant. The magistrate had no power to set-off the claim of the respondents against the wages due from them to the appellant. In order that the right of set-off under s. 3, sub-s. 1, and s. 4 of the Employers and Workmen Act, 1875, may arise, there must be a claim by both the employer and the

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workman, i.e., claims made in the proceeding before the Court. In the present case there was no claim made by the workman in the proceeding. The Wages Attachment Abolition Act, 1870 (33 & 34 Vict. c. 30), prevents a workman's wages being attached. The object of the respondents is to evade the provisions of that Act and the decision in *Williams* v. *North's Navigation Collieries* (1889), *Ld.* (1), which shews that a workman is entitled to be paid his wages in full. [Rule 3 of the Employers and Workmen Rules, 1886, was also referred to.]

J. E. Bankes, K.C., *M. Lush, K.C.*, and *Trevor Lewis*, for the respondents. The object of the Employers and Workmen Act, 1875, is that disputes between employers and workmen should be settled in a summary way. A workman's wages accrue due from day to day. Sect. 3, sub-s. 1, of the Act of 1875 gives the Court power to "adjust" as well as to "set off" claims. A workman may have a claim against an employer, although he does not choose to put it forward. The word "claims" in s. 3, sub-s. 1, of the Employers and Workmen Act, 1875, includes subsisting obligations between employers and workmen, although a workman may not choose to put forward a claim founded on the obligation existing on the part of the employer towards him. Immediately the employer claims the right of set-off there is a dispute which gives the Court jurisdiction under s. 3 of the Act of 1875. The dispute existed although it was originated by the master. [*Ex parte Llynvi Coal and Iron Co., In re Hide* (2), was referred to.]

Rufus Isaacs, K.C., in reply. There is nothing in the Employers and Workmen Act, 1875, to shew that an employer may put forward a claim on behalf of a workman.

LORD ALVERSTONE C.J. In this case the question is raised as to the right of the magistrate to direct that the sum of 11*s.* 3*d.*, made up of 5*s.* 9*d.* damages and 5*s.* 6*d.* costs, should be set off against a sum of 1*l.* 15*s.* 8*d.* which became payable to the workman two days after the decision was given. In my judgment, for reasons which I am about to give, the decision of the magistrate was right. On May 18 the proceedings were

(1) [1906] A. C. 136. (2) (1871) L. R. 7 Ch. 28.

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commenced by the employers. They complained that the workman had not worked on April 30, and alleged that there were due to them from him damages for having wrongfully absented himself from work. They made the further claim, which in my judgment was a subsisting claim within the meaning of s. 3 of the Employers and Workmen Act, 1875, "that the wages earned by and due to the defendant from the plaintiffs be ascertained, and that the said respective claims for damages and wages be adjusted and set off by the Court." The workman had by the summons preferred by the employers notice of two disputes which had arisen between his employers and himself out of and incidental to his relations with them. In one of those disputes it was alleged by the employers that damage had been caused by reason of his not working, and in the other the employers claimed to have that damage set off by the Court against the wages due to the workman. The notice of the disputes was given in May, 1909, and contemplated that before the case would be heard or determined, or at the time when it was determined, there would be wages accruing due. On August 18, 1909, the judgment being given by the magistrate on the next day, the workman had worked up to the previous Saturday, and there was due to him a fortnight's wages, which he would have received on Saturday, August 21. On behalf of the workman it is contended that the magistrate had no jurisdiction to order the 11*s.* 3*d.*, the sum he awarded to the employers for damages and costs, to be set off against the sum of 1*l.* 15*s.* 8*d.* due to the workman for wages. In my opinion the magistrate would not have jurisdiction to allow any claim to be introduced which was not raised before he adjudicated. But in my judgment, if upon the hearing of a dispute which has arisen either party makes a claim and the other party disputes it, there is "a dispute between the employer and workman arising out of or incidental to their relations as such" within the meaning of s. 3 of the Employers and Workmen Act, 1875. That is the broad principle upon which I desire to base my judgment. The present case is still stronger in the employers' favour because by the notice of May 18, which gave the magistrate jurisdiction, the workman was informed that there were two disputes between the employers and the workman,

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one as to there being a claim for damages and the other as to how they were to be paid. The workman contested both claims. In my judgment those claims constituted two disputes which arose between the employers and the workman and the magistrate had the power to set off one claim against the other. I am of opinion that the words "claims on the part . . . . of the workman" in s. 3 of the Employers and Workmen Act, 1875, mean claims subsisting at the time the dispute is raised. The test is not whether the workman chooses to bring before the Court a claim to have wages paid to him by the employer or a claim that the sum due from him to the employer shall not be deducted from his wages. They are in fact both claims on the part of the workman in disputes between him and the employer, and in my judgment the language of the Employers and Workmen Act, 1875, shews that it was intended that the magistrate should adjust and make an end of the disputes.

If I were able to see any real reason why it would be unjust that this course should be taken, I should hold that the matter did not come within the jurisdiction of the magistrate or county court judge. The order made by the magistrate is not equivalent to an attachment of wages, and in my opinion the Wages Attachment Abolition Act, 1870, has no application. The order made by the Court was that the wages, which were already due and which would be payable immediately after the judgment, should not be paid in full, there being a dispute which the magistrate had decided in favour of the employers, but that as against the wages the sums of 5*s.* 9*d.* by way of damages and 5*s.* 6*d.* by way of costs should be paid out of them. In my judgment the magistrate had a discretion to make what order he thought right, and in saying that the matter ought to be adjusted between the parties he in no way exceeded his jurisdiction.

The decision in *Williams* v. *North's Navigation Collieries* (1889), *Ld.* (1) has no bearing upon the present case, because a claim was there made by a master to deduct arbitrarily from the payment of the wages what he thought to be due from the workman without invoking the jurisdiction of a Court of any

(1) [1906] A. C. 136.

kind to adjust the matter between them. For these reasons I think the appeal fails.

RIDLEY J. I agree that this appeal fails for the same reasons as those given by the Lord Chief Justice, although I think that our judgment could be placed on another basis in addition to that stated by him. It seems to me that it may very well be contended that the word "claims" in the Employers and Workmen Act, 1875, is not intended to be confined to claims in a technical sense which are being put forward in accordance with the procedure of the Court and are in that way actually before the Court. It appears to me to be in accordance with the object of the statute—which was, I think, to settle disputes between an employer and the employed—to hold that there is a claim if there is in fact a debt which is found to be subsisting between the parties, as there is in the present case. No claim in the technical sense has been brought forward by the workman, but there is in fact a debt subsisting between the employers and him to the amount of his wages which were due and were payable on the Saturday following the date of the judgment. It appears to me that it may very well be said that that debt was a claim although it was not technically put forward by the workman as a claim, and that on that ground the judgment of the magistrate might be affirmed. But probably the safer and the more general ground upon which to base our judgment is that pointed out by the Lord Chief Justice as applying to this case, although possibly it might not cover all cases which might arise under the Employers and Workmen Act, 1875, because the employer might not in all cases put forward the further claim which the respondents did in the present case, namely, that from the wages earned by the workman should be deducted the damages claimed by them. Upon both grounds, however, I think that our judgment ought to be in favour of the decision of the magistrate.

It may be observed that if the workman is to be allowed to refuse to make a claim in respect of wages due to him, he would be enabled to frustrate the real object of the Employers and Workmen Act, 1875. For these reasons I agree that the appeal fails and must be dismissed.

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DARLING J. I regret to say that I have come to the opposite conclusion, but I am by no means sure that if my view were to prevail it would be to the advantage either of the workman or the employer. There have been many instances in the past where persons have not appreciated their good fortune, and it may be that masters and workmen are in that position, or in this particular case the workman is, in seeking to obtain a decision contrary to that which has been given by the majority of this Court. But as our opinion on the question which arises under the Employers and Workmen Act, 1875, is desired, I feel that I ought to express the grounds upon which my judgment is based.

The summons or notice issued by the employers against the workman sets out that the employers claim against him damages for breach of contract, and continues: "The plaintiffs further claim that the wages earned by and due to the defendant from the plaintiffs be ascertained and that the said respective claims for damages and wages be adjusted and set off by the Court." As to the first head of claim contained in the summons I agree that it is a claim by the employers, but as to the second I do not think that it is a claim either by the employers or by the workman within the meaning of s. 3 of the Employers and Workmen Act, 1875. There were wages which were due to the workman. He did not ask for them, nor had he in any way invoked the judgment of the Court upon the matter. The question is whether under the Act of 1875 the employers can invoke the judgment of the Court upon the further claim which they made. It is to be observed that s. 3, sub-s. 1, of the Act gives the county court power to adjust and set off "such claims." There is no previous reference in the statute to any claim. The language of the opening portion of s. 3 is "in relation to any dispute." The word "claims" in sub-s. 1 of s. 3 appears, therefore, to be used in the sense of "any dispute" in the first portion of s. 3. But it would appear also that there is no dispute to be decided by the Court unless it takes the form of a claim because it is referred to as "such claim." One of the parties must make a claim against the other. In the present case it is conceded that the workman had made no claim. It is true he had disputed that he owed the master money for damages,

but he made no claim, and to hold that where an employer in effect says to the workman "You owe me damages," and the workman replies "No, I dispute that I owe you damages," there is a claim made by the workman would be a perversion of language. The only way in which that dispute by the workman could be framed as a claim would be for him to say "I claim that I do not owe you damages," which would not be an accurate mode of expression. In my judgment the words "it"—i.e., the Court—"may adjust and set off the one against the other all such claims" postulate conflicting claims. In the present case there were no conflicting claims, for all the claims as set forth in the summons were made by the employers alone. That the workman disputed both claims of the employers does not result in the making of a claim by him. There were separate disputes, each one founded on the employers' claim, but two separate disputes by the workman as to claims made by the master do not make a claim by the workman.

I have felt some difficulty in coming to this conclusion having regard to sub-s. 2 of s. 3, which says that "If, having regard to all the circumstances of the case, it" (i.e., the Court) "thinks it just to do so, it may rescind any contract between the employer and the workman upon such terms as to the apportionment of wages or other sums due thereunder, and as to the payment of wages or damages, or other sums due, as it thinks just." In my opinion, if in the present case the Court had come to the conclusion that it was useless to expect the plaintiffs and defendant to go on working under the contract existing between them, it might have acted on the power given by that sub-section and have rescinded the contract. In those circumstances the Court would have had to take into consideration not only the damages and costs due to the respondents, but would have had to ascertain what might be due from the respondents to the appellant. Had that been done, I think, not because there was a claim by the workman, but because the matter would have been within the terms of sub-s. 2 of s. 3, the Court could then have set off the damages awarded to the respondents against any money then due from them to the appellant, but purely for the reason that it would have been necessary to do so in order to carry out the intention of sub-s. 2 of s. 3.

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Darling J.

I differ from the other members of the Court with the greatest diffidence, but as I have my own opinion upon the matter I felt bound to express it.

Appeal dismissed.

Solicitors for appellant: *Smith, Rundell & Dods, for Morgan, Bruce, Nicholas & James, Pontypridd.*

Solicitors for respondents: *Bell, Brodrick & Gray, for C. & W. Kenshole, Aberdare.*

J. E. A.

1910
Jan. 17.

IN THE MATTER OF AN ARBITRATION BETWEEN AFRICAN ASSOCIATION, LIMITED, AND ALLEN.

Master and Servant — Agreement for Employment — Right to terminate — Necessity for Notice.

An agreement for the employment of a clerk or trade assistant in Africa for two years at a salary at and after the rate of 250*l.* a year provided that the employers might at any time at their absolute discretion terminate the engagement at any earlier date than that specified if they desired to do so:—

Held, that the power to terminate the engagement at an earlier date than that specified could only be exercised after giving reasonable notice.

SPECIAL CASE stated by arbitrators pursuant to s. 19 of the Arbitration Act, 1889.

On May 2, 1907, an agreement was entered into between the African Association, Limited, of Liverpool (thereinafter referred to as the employers) of the one part and Herbert G. Allen (thereinafter referred to as the assistant) of the other part.

The following were the material clauses of the agreement (1):—

"1. The said assistant shall proceed to Matilda Factory, Calabar, by the steamer intended to leave Liverpool on or about May 4, 1907, and, there, or at any other station, or up any river, as hereinafter provided, place himself entirely under the direction

(1) In addition to the question dealt with in this report, the special case raised another question which was not argued. So much of the case and of the agreement as related thereto has therefore been omitted.

and control of Mr. F. G. Walker, agent of the said employers, or of any other agent whom they may hereafter appoint.

"2. The said assistant shall as from the date of leaving Liverpool for Africa become, and as hereinafter provided, continue for two years, or until the date of his leaving Africa, in the service and employment of the said employers as clerk and trade assistant for them at Matilda Factory, Calabar, on the west coast of Africa, or at any other place on that coast or the rivers thereof which the employers or their agent for the time being may from time to time direct. Provided always, however, that the employers may at any time hereafter, at their absolute discretion, terminate this engagement at any earlier date than that specified if they may desire to do so.

"3. The passage outwards is to be paid by the employers, and should the assistant remain and complete the full term, his passage homewards shall also be so paid. But the passage homewards is to be charged to the assistant's account, and paid by him, if from any cause, except unavoidable sickness, he returns before the expiration of the two years.

"7. In consideration of his faithful service and due performance of all the conditions hereof, the employers agree to pay the assistant's salary at and after the rate of 250*l.* for the first year, and 250*l.* for the second year, and so for any less period than a year, commencing on the date of his arrival at Calabar as hereinbefore mentioned, and terminating on the day of the termination of this agreement as herein provided, or of the assistant, whether for unavoidable sickness or any other cause whatever, leaving the coast.

"8. Should the assistant fail to give satisfaction to the employers, or to their agent or other representative exercising their authority for the time being, and of such failure the said agent or other representative of the employers shall be the sole judge; or should the assistant absent himself from any duties or barter or trade in any manner whatever except on the employers' account, and in pursuance of orders given to him, then, and in any such case, the said agent or other representative may summarily dismiss the assistant, and the said assistant shall then have no claim upon the employers for his passage homeward."

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In pursuance of the agreement Allen proceeded to the west coast of Africa and took up his duties there, and continued in the service of the association until September 6, 1907, when by direction of the agent of the association he returned to England. Upon his arrival in Liverpool he was informed by one of the managers that his engagement was terminated under clause 2 of the agreement. He received no previous notice terminating his engagement, and no reason for the determination thereof was given to him.

The question of Allen's dismissal having been referred to arbitration, the arbitrators stated this case, the question for the opinion of the Court being whether under the terms of the agreement the association were entitled under the proviso in clause 2 to terminate the engagement of Allen at an earlier date than that specified in the agreement without giving to him previous notice of their intention in that behalf.

Layton, for Allen. In a contract of service of this description there is an implied term that the engagement shall not, in the absence of misconduct, be determined by the employers at a time other than that specified, except after reasonable notice; and that implied term must be read into clause 2 as qualifying the words "at their absolute discretion." In *Down* v. *Pinto* (1) the employer engaged a foreman "for at least three years at my option," and it was held that the words "at my option" did not mean that the employer could put an end to the employment at any period, but only that he had an option of saying whether the service should continue for one, two, or three years. To construe clause 2 as giving what is practically a power of summary dismissal to the employers renders clause 8 meaningless, for clause 8 enables the employers to do, in certain specified cases only, that which according to the employers' contention they are entitled to do under clause 2 without any restriction whatever.

Bailhache, K.C., and *Segar*, for the association. In this case the salary payable under the agreement was "at and after the rate of 250*l.*" a year, whereas in *Down* v. *Pinto* (1) it was 250*l.*

(1) (1854) 9 Ex. 327; 23 L. J. (Ex.) 103.

per annum. That distinction is of importance, for Parke B. said (1): "What particularly weighs with me is, that the contract contains no provision for the payment of a proportionate part of the salary. Payment for instance is not to be at the rate of 250*l.* per annum." That shews that the words "at their absolute discretion" in this agreement ought to be construed in their ordinary meaning without any restriction.

[LORD ALVERSTONE C.J. The passage which you have read from the judgment of Parke B. does not appear in the report of *Down* v. *Pinto* in 9 Ex.]

The wording of clause 2 taken by itself absolutely excludes any question of notice, and the natural meaning of that language is not in any way altered or affected by the provisions of clause 8. The object of that clause is to empower the association's agents in Africa to put an end to the agreement, and it was considered necessary that their power to do that should be restricted to certain specified cases, but there was no reason for inserting any restrictions on the power of summary dismissal conferred by clause 2 on the employers themselves, and the language of that clause has intentionally been left perfectly general.

LORD ALVERSTONE C.J. In my opinion our judgment in this case must be in favour of Allen. The general principle applicable to contracts of service is that, in the absence of misconduct or of grounds specified in the contract, the engagement can only be terminated after reasonable notice. In my opinion this case cannot be decided on the authority of *Down* v. *Pinto* (2), and I only desire to say with regard to that case that if the passage from the judgment of Parke B. which appears in the *Law Journal* report had also been in the report of the case in 9 Ex. it would not in any way have affected my judgment. The only question which we have to consider is whether clause 2 of this agreement confers upon the employers the right to dismiss their servant summarily. Mr. Bailhache's argument seems to me to overlook the fact that, although the employers clearly have the right to determine the engagement at an earlier date than the expiration of the two years, clause 2 does not say in terms,

(1) 23 L. J. (Ex.) at p. 105. (2) 9 Ex. 327; 23 L. J. (Ex.) 103.

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AFRICAN ASSOCIATION LIMITED, AND ALLEN, *In re.*

Lord Alverstone C.J.

nor in my opinion does it say by implication, that the servant may be summarily dismissed. The employers may in their discretion terminate the engagement at any time, but in my opinion the proper construction to place upon the language of clause 2, particularly when one bears in mind that the agreement relates to service abroad, is that it means that that discretionary power to terminate the engagement at any time can only be exercised after reasonable notice of their intention has been given by the employers.

BUCKNILL J. I am of the same opinion, and for the same reasons.

BRAY J. I agree. It must, I think, be taken to be the law that an agreement of employment of this nature confers no right on the employer, in the absence of misconduct, to terminate the engagement without reasonable notice, unless the agreement contains clear words indicating a contrary intention. This contract provides for an engagement for two years; but the employers desired to have an opportunity of terminating it earlier if they so wished, and, therefore, clause 2 provides that "the employers may at any time hereafter, at their absolute discretion, terminate this engagement at any earlier date than that specified." That seems to me to give an option in favour of the employers, which option can, however, only be exercised by them on the usual and implied term of giving reasonable notice of their intention to exercise it. But the matter does not rest there. The termination of an engagement without notice is practically the same thing as a summary dismissal, and we find in clause 8 of the agreement a power to summarily dismiss the servant for certain specified reasons. The inference which I draw from that is that the determination of the engagement at any time under clause 2 is not the same thing as the summary dismissal under clause 8. I therefore come to the conclusion that in the circumstances of this case reasonable notice was required.

Judgment accordingly.

Solicitors for Allen: *Freer & Co., for J. H. Walker, Liverpool.*

Solicitors for African Association: *Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool.*

F. O. R.

THE BOARD OF TRADE *v.* THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED.

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Nov. 29;
Dec. 13.

Bankruptcy—Trustee—Fidelity Bond—Surety—Default of Trustee—Penal Interest—Liability of Surety—Unpaid Remuneration of Trustee—Set-off—Disbursements—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 74, *sub-s.* 6.

A trustee in bankruptcy and his surety entered into the usual bond with the Board of Trade in the penal sum of 500*l.* (afterwards reduced to 100*l.*) for the due performance of his duties as trustee, subject to a condition avoiding the bond if he should duly perform his duties, or if he made default and the surety should "make good any loss or damage occasioned by any such default." The trustee improperly retained for some years a sum of money, and, on his default being discovered, he was removed from his office and, pursuant to s. 74, sub-s. 6, of the Bankruptcy Act, 1883, he forfeited his remuneration as trustee and was surcharged with penal interest on the sum he had improperly retained, and this penal interest exceeded 100*l.* He made good the sum he had retained, but did not pay the penal interest:—

Held, that the surety, by reason of his liability under the bond to make good "loss or damage occasioned" by the default of the trustee, was bound to pay the penal interest to the extent of 100*l.*

Held, also, that the trustee's remuneration that was forfeited could not be set off against the penal interest.

Board of Trade v. *Guarantee Society* (post, p. 408, n.) followed on this point.

But *held*, that the disbursements properly made by the trustee could be set off against such interest.

This was a special case stated under Rules of the Supreme Court, Order xxxiv., and raised the question whether the surety of a trustee in bankruptcy under the usual fidelity bond was liable for the penal interest with which the trustee had been surcharged under s. 74, sub-s. 6 of the Bankruptcy Act, 1883, in these circumstances.

On April 28, 1894, a receiving order was made against the Dowager Countess della Torre, a widow, in the Windsor County Court, and on May 23, 1894, she was adjudicated a bankrupt. At a meeting of her creditors held on June 1, 1894, an accountant was appointed the trustee in bankruptcy, and on June 5 following his appointment was duly certified by the Board of Trade.

By a bond dated June 4, 1894, the trustee with his surety,

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the Employers' Liability Assurance Corporation, Limited (hereafter called the corporation), became jointly and severally bound to the Board of Trade in the sum of 500*l.* for the purpose of securing the due performance by the trustee of the duties required of him as such trustee, subject to a condition for avoiding the said bond "if the said trustee shall and do from time to time well and sufficiently perform and execute all and singular the duties required of him as trustee by the Bankruptcy Acts 1883 and 1890 or any general rules made or hereafter to be made under such Acts or if the said trustee shall fail therein and the said corporation shall make good any loss or damage occasioned by any such default made after the date hereof to the estate of the said bankrupt including so much of the costs of the removal of the defaulting trustee and the appointment of his successor as shall be in excess of the amount which in the opinion of the Inspector-General in Bankruptcy shall represent the value of the work done by the defaulting trustee for which he shall not have received remuneration to the extent of 500*l.* this obligation shall be void or otherwise shall remain in full force and virtue."

By an instrument under seal dated May 21, 1908, it was agreed that the corporation should be liable "to make good any loss or damage occasioned by the default of the said trustee subsequent to June 4, 1908, only to the extent of 100*l.* in lieu of the sum of 500*l.* as provided in the said bond but nothing therein contained should relieve the corporation from any obligation or liability in respect of any default of the said trustee prior to June 4, 1907."

In September, 1900, the trustee entered into a contract for the sale of certain copyhold property of the bankrupt for the sum of 305*l.* and received a sum of 30*l.* 10*s.* by way of deposit in respect of the contract. On October 18, 1900, the sale was completed, and the trustee received a further sum of 274*l.* 2*s.*, being the balance of the 305*l.* after allowing for certain outgoings. Pursuant to the provisions of the Bankruptcy Acts and Rules, the trustee from time to time sent to the Board of Trade documents purporting to be verified accounts of his receipts and payments as such trustee as aforesaid from the date of his appointment down to the date of his removal from office as hereafter mentioned. In the account

covering the period from May 25, 1900, to October 28, 1900, the said sum of 30*l.* 10*s.* was disclosed as having been received by him on September 28, 1900, and in his next account, covering the period from October 29, 1900, to June 18, 1901, he disclosed the receipt of the further sum of 125*l.* as having been received further on account of the sale of the said copyhold property on December 22, 1900, but, except as aforesaid, he failed to account for 149*l.* 2*s.* the balance of the said purchase-moneys received by him until the date hereafter mentioned.

On May 3, 1907, the trustee applied to the Board of Trade for his release from the office of trustee, and thereupon he was required to furnish an explanation of the fact that, although the purchase price of the said property was 305*l.*, he had only accounted for 155*l.* 10*s.* in respect thereof. He at first alleged that the purchaser had made default in paying the balance of the purchase-money, but subsequently he admitted that he had received the whole sum due from the purchaser, and on August 26, 1908, he remitted to the Bank of England, to the credit of the Bankruptcy Estates Account, 149*l.* 2*s.*, being the sum that he had received and had not accounted for.

By an order dated September 26, 1908, the Board of Trade, in pursuance of the powers conferred upon them by the Bankruptcy Acts, 1883 and 1890, removed the trustee from his office upon the ground that he had retained a sum of more than 50*l.*, namely, the said sum of 149*l.* 2*s.*, for more than ten days, contrary to the provisions of s. 74 of the Bankruptcy Act, 1883, and had failed to explain such retention to the satisfaction of the Board of Trade.

The amount of remuneration to which the trustee would have been entitled in pursuance of the resolutions of the committee of inspection passed in 1898 and 1900, if he had not made any default in carrying out his duties as trustee, was 122*l.* 4*s.* 7*d.*, but the only remuneration claimed by him amounted in the aggregate to 55*l.*, which amount had been allowed to him on the audit of his accounts prior to the discovery of the fact that he had failed to pay over the said sum of 149*l.* 2*s.* as aforesaid. No further claim to remuneration was made by him. At the date of the order removing him from his office there was due to him

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for disbursements made by him on account of the estate the sum of 19*l.* 5*s.* 11*d.*, which had not been repaid to him. In consequence of his having failed to explain the retention of the said sum of 149*l.* 2*s.* to the satisfaction of the Board of Trade he was surcharged with interest on so much thereof as exceeded 50*l.* at the rate of 20 per cent. per annum for the period during which it was retained in excess of ten days (1), and this penal interest amounted to 155*l.* 3*s.* 7*d.*

By letter dated September 23, 1908, the Board of Trade required the trustee to pay the 155*l.* 3*s.* 7*d.*, but he failed to do so, and thereupon the Board of Trade called upon the corporation "to pay the sum of 100*l.* towards the loss or damage occasioned to the estate of the bankrupt by the said default in accordance with" the bond of June 4, 1894, as modified by the deed of May 21, 1908. The corporation denied their liability, and thereupon the Board of Trade issued a writ against them for the 100*l.*, but by consent this special case was stated under Rules of the Supreme Court, Order XXXIV., &c., the question for the opinion of the Court being whether the corporation were liable to pay the 100*l.* or any sum.

Hansell, for the Board of Trade. Prior to the case of *In re Sims* (2) this penal interest was paid to the Treasury, but in that case all the earlier authorities were considered, and Bigham J. held that the penal interest forms part of the bankrupt's estate for the benefit of his creditors. It is really the statutory measure of damages assessed by the Legislature for the trustee's default in retaining the money, and the defendants are liable under the bond to make it good to the extent of 100*l.* Moreover, the trustee has made a second default in not paying the penal

(1) The Bankruptcy Act, 1883, s. 74, sub-s. 6, enacts: "If a trustee at any time retains for more than ten days a sum exceeding fifty pounds, or such other amount as the Board of Trade in any particular case authorise him to retain, then, unless he explains the retention to the satisfaction of the Board of Trade, he shall pay interest on the amount so retained in excess at the rate of twenty pounds per centum per annum, and shall have no claim for remuneration, and may be removed from his office by the Board of Trade, and shall be liable to pay any expenses occasioned by reason of his default."

(2) [1907] 2 K. B. 36.

interest. Further, it has been held by the Divisional Court in an unreported case of *Board of Trade* v. *Guarantee Society* (1), similar to the present case, that the trustee's forfeited remuneration could not be set off against the penal interest. With regard to the disbursements, even if they are allowed and deducted, the balance of penal interest will exceed the 100*l.* payable under the bond.

Reed, *K.C.*, and *F. Mellor*, for the defendant corporation. This is the first case in which a penalty imposed on the trustee has been claimed against the surety under the usual fidelity bond. The amount of the security given by the bond is always fixed in relation to the amount of the bankrupt's estate and is intended to cover "loss or damage" to the estate, and it is submitted that penalties that might be incurred by the trustee are not within the purview of the bond. The 20 per cent. interest is not a liquidated sum by way of damages, but it is a penal sum in the nature of a punishment inflicted on the trustee personally for his misconduct, and for the non-payment of which he can be sent to prison: *Beresford* v. *Birch* (2); *In re Nicholson* (3); and he can be charged with this penal interest not only for the period whilst he is trustee, but for so long as he retains the money: *In re Tatum*. (4) Looking to the words of the bond, what the estate is guaranteed against is loss or damage to the estate of the bankrupt, which, as defined by s. 44 of the Act, is the property of the bankrupt divisible amongst his creditors. Here the loss was 149*l.* 2*s.*, but it has been made good, and 5 per cent. on that sum whilst retained may be the actual damage to the estate; but this penal interest is a gain to the estate in the nature of a bonus to the creditors. It could never have been intended that the assured should make a profit out of the surety by reason of the trustee's default. The limit of the defendants' liability under the bond is to make good to the extent of 100*l.* any diminution to the estate, not an accretion to the estate. With regard to setting off the remuneration it is admitted that in face of the decision of the Divisional Court in *Board of Trade* v. *Guarantee Society* (1) that point cannot be argued in this Court.

(1) See note, post, p. 408.
(2) (1824) 1 C. & P. 373.
(3) (1890) 7 Mor. 257, 260.
(4) (1889) 6 Mor. 107.

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As to the disbursements, it is submitted that they can be set off.

Hansell, in reply, referred to *Ex parte Goldsmith.* (1)

Cur. adv. vult.

Dec. 13. PHILLIMORE J. delivered the following considered judgment:—The defendant corporation was surety for a trustee in bankruptcy, first to the extent of 500*l.*, and later to the reduced amount of 100*l.* By the instrument of suretyship the corporation undertook, if the trustee should fail in his duties, to "make good any loss or damage occasioned by any such default." The trustee failed in his duties in that he retained 149*l.* 2*s.* for more than ten days and failed to explain his retention to the satisfaction of the Board of Trade, and he was accordingly surcharged with interest at the rate of 20 per cent. per annum on the balance which he retained exceeding 50*l.*, this surcharge being in accordance with the provisions of s. 74 of the Bankruptcy Act of 1883. This 20 per cent. amounts to 155*l.* 3*s.* 7*d.*, and the Board of Trade seek to make the corporation pay so much of it as is covered by the security, namely, 100*l.*

The first question I have to determine is whether the corporation can be required to pay this by reason of the liability to "make good any loss or damage." It is said for the corporation that this interest is not a compensation for any loss or damage, but a penalty. It is said for the Board of Trade that it is a conventional measure of the loss or damage which the estate to be administered in bankruptcy may be treated as having sustained. I have referred to all the cases cited in argument, especially to *In re Sims* (2), and to the cases cited in the learned opinion quoted in the note to *In re Sims.* (2) The judgment in *In re Sims* (2) altered the course of practice which had prevailed for some years, and according to which this interest was treated as accruing to the Treasury and not as forming part of the bankrupt's estate, and determined that it did form part of the bankrupt's estate. This interest has been imposed by a series of statutes going back to 49 Geo. 3, c. 121. But the statutory imposition is

(1) (1824) 1 Gl. & J. 405. (2) [1907] 2 K. B. 36.

probably an extension of the rule of the Court of Chancery imposing interest at 5 or 4 per cent. upon assignees who improperly kept balances in their hands; and this 5 or 4 per per cent. was, as is shewn by the case of *Treves* v. *Townsend* (1) and other cases, recoverable directly by the creditors and for their own benefit. However this may be, I must take the decision in *In re Sims* (2) as right, and this money goes to the creditors. Then it is contended that I cannot treat it as compensation for loss or damage, but as some peculiar bonus which has accrued to the creditors. It is said that the delay cannot have caused a loss of 20 per cent., and that creditors are only allowed 5 per cent. interest on their debts, so that if, for example, the sum retained would have enabled a dividend of 20 shillings in the pound to have been paid, its retention has only cost the estate interest at 5 per cent. But to this there are several answers: (1.) The bankrupt has an interest in the estate after his debts have been paid in full, and ready money may be worth much more to him than 5 per cent. (2.) There are cases where a sum of ready money might put the trustee in funds if he properly applied them to carry on the business, to complete a contract, or to save an equity of redemption of considerable value. (3.) When a trustee is once found improperly retaining funds it is very probable that the full extent of his misconduct may not be discovered; he may have retained other sums or more, or for a longer period than his accounts compel him to disclose, and to make sure of not erring in his favour the statute fixes 20 per cent. The contrary theory of a bonus to the creditors rests upon no principle.

I am of opinion, therefore, that the corporation can be required to pay this interest by reason of the liability to make good loss or damage. Two subordinate questions arise. The remuneration of the trustee, if he had made no default, would have amounted to 122*l.* 4*s.* 7*d.* He had received 55*l.* before his default was discovered. He has lost the balance of his remuneration as a punishment for his default. The corporation say that if the estate was a loser by his default it was to some extent a

(1) (1784) 1 Bro. C. C. 384. (2) [1907] 2 K. B. 36.

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Phillimore J.

gainer by saving this part of his remuneration, and that it is only liable for the balance. This point is said to have been decided in the unreported case *Board of Trade* v. *Guarantee Society* (1), decided by Cave and Wills JJ. on June 10, 1896. I have looked at the decision in that case and I think it does decide this point, and I think it rightly so decides it, against the corporation. The other subordinate matter is that the trustee has a claim to deduct disbursements made by him on account of the estate to the amount of 19*l.* 5*s.* 11*d.* This is so. But it still leaves the Board of Trade with a claim for more than 100*l.* Therefore there must be judgment against the defendant corporation for 100*l.* and costs.

Solicitors: *Solicitor to the Board of Trade; Watson, Sons & Room.*

H. L. F.

[Note.]

THE BOARD OF TRADE *v.* THE GUARANTEE SOCIETY.

June 10, 1896.

CAVE J. I am of opinion that we must decide this question in favour of the Board of Trade. The single point is whether the defendants, in making good the loss or damage occasioned by the default of the trustee in not sufficiently performing his duties, are entitled to deduct from the amount which he has not paid the amount which has not been paid to him but which has been earned by him by way of remuneration. Now when you come to look at the statute, s. 74 says that if the trustee does certain things therein mentioned he is to have no claim for remuneration. That is a very strong prima facie case for saying that this default of his must be made good and that there is no claim for remuneration that can be set off against it. The default is to be made good, that is, by the payment of this money into the hands of the Board of Trade. When that has been done, then the default has been made good. After that, no claim can be made for remuneration, because the statute says the trustee shall forfeit his claim to remuneration. The language of the condition of the bond has been referred to, which speaks of "including so much of the cost of the removal of the defaulting trustee and the appointment of his successor as shall be in excess of the amount representing the value of the work done by the defaulting trustee for which he shall not have received remuneration." That argument would have been sufficiently convincing if the bond had gone on to say "and the excess of such unpaid remuneration which is more than the costs of removing the trustee shall be deducted by the Guarantee Society."

(1) See note infra.

If that had been said, the case would have been fairly plain ; but that is not said, as it appears to me, because it was not intended. I should have said that without the words "including so much," and so on, there could have been no claim made upon the guarantee society for the cost of the removal of the defaulting trustee. But that is expressly included by the language of the condition, and that being so included by the language of the condition, it stops short at allowing a set-off to that extent and does not go on to provide that the balance shall be deducted. I think that points out very clearly that the balance shall not be deducted. Take for instance the case of a guarantee society guaranteeing the performance of his duty by an assistant overseer, who is paid an annual salary payable half-yearly. At the end of six months he bolts with a large sum of money in his possession belonging to the overseers. The guarantee society are called upon to replace the money. He has no claim for remuneration, he has forfeited that by bolting. Would the guarantee society be entitled to deduct from the sum he has bolted with the amount of his half-year's salary on the ground that the parish had saved that half-year's salary inasmuch as they would not now have to pay it to anybody? It is quite clear that such a claim as that could not be listened to for a moment. Suppose again the case of the guaranteeing of the fidelity of a domestic servant. The domestic servant makes default and bolts with 10*l.* in his pocket, or is dismissed, we will say, because he has embezzled 10*l.* Could the guarantee society say, "Oh, we ought not to pay the full 10*l.* because this servant was supplied by his master with a suit of clothes and he has been dismissed and left the suit of clothes behind, as of course he would do, and therefore you ought to deduct from the 10*l.* the value of the second-hand suit of clothes"? A thing of that kind only wants to be stated in order to see that it is not within the purview at all of the contract between the parties. The contract is, that whatever money is not properly accounted for by the trustee is to be made good by the guarantee society, and we are not to look to such things as the question of whether there is or is not any remuneration due, when that remuneration is declared to be forfeited and therefore is no longer due to the man who has made default. For these reasons it appears to me that the contention of the Board of Trade is right and that they are entitled to judgment.

WILLS J. I am of the same opinion.

Solicitors: *Solicitor to the Board of Trade; Budd, Johnson & Co.*

H. L. F.

1909
Dec. 10, 11.

THORMAN *v.* DOWGATE STEAMSHIP COMPANY, LIMITED.

Ship—Charterparty—Loading Time—Colliery Guarantee—Exceptions—Any other Cause beyond Charterer's Control—Construction—"Ejusdem generis" Principle.

A ship was chartered to proceed to the Alexandra Dock at Hull and there load a cargo of coal in 120 hours on conditions of usual colliery guarantee. The colliery guarantee excepted from the loading time Sundays, holidays, strikes, frosts or storms, any accidents stopping the working, leading, or shipping of the cargo, restrictions or suspensions of labour, lock-outs, delay on the part of the railway company either in supplying wagons or leading the coals, "or any other cause beyond the charterer's control." The ship arrived in the dock and gave notice of readiness to load on July 23, but, owing to the presence of other vessels which had previously arrived and were waiting to load, the turn of the ship to come under a loading tip was not reached until August 1. On a claim by the owners against the charterer for demurrage:—

Held, following *Monsen* v. *Macfarlane*, [1895] 2 Q. B. 562, that the lay hours commenced to run on the arrival of the ship in dock; that the words "any other cause beyond the charterer's control" must be construed as referring to matters ejusdem generis with the antecedent exceptions; that the cause of the delay, namely, the presence of other ships in the dock, was not a matter ejusdem generis with those exceptions, and that the charterer was, therefore, not protected by the exceptions clause and was liable for demurrage.

In re Richardsons and Samuel, [1898] 1 Q. B. 261, followed. *Larsen* v. *Sylvester*, [1908] A. C. 295, distinguished.

Action in the commercial list tried by Hamilton J. without a jury.

The plaintiff's claim was admitted, subject to a counterclaim by the defendants, as owners, against the plaintiff, as charterer of the steamship *Aldgate*, for demurrage at Hull, the port of loading.

The charterparty was dated July 19, 1907, and provided that "the *Aldgate* . . . . now at Rotterdam . . . . shall, with all convenient speed, proceed to Hull (Alexandra Dock) as ordered by charterer, and there take on board as tendered in the usual manner, according to the custom of the place, as per colliery guarantee, which owner agrees to accept, a full and complete cargo of coal not exceeding 5200 tons . . . . Demurrage at and

after the rate of 16*s.* 8*d.* per hour . . . . Steamer to be loaded in 120 hours on conditions of usual colliery guarantee."

The colliery guarantee, which, as the learned judge found, was accepted by the defendants as being in the usual form, was, so far as is material, in the following terms:—"I guarantee to load the s.s. *Aldgate* with about — tons (cargo only) of coals in — hours (Sundays, bank holidays, cavilling days and colliery holidays excepted). Time not to count until after the said steamer is wholly unballasted and ready in dock to receive her entire cargo. Strikes of pitmen or workmen, frosts or storms, and delays at spouts caused by stormy weather, and any accidents stopping the working, leading, or shipping of the said cargo, also restrictions or suspensions of labour, lock-outs, delay on the part of the railway either in supplying wagons or leading the coals, or any other cause beyond my control, such stoppage occurring any time between the present date and actual completion of loading, always excepted . . . . Time to count from 6 A.M. following the receipt of notice (in writing) of readiness by Robert Thorman, if the steamer is actually ready as above stipulated, and not before . . . . Should the colliery be off work through any cause whatever, time not to count."

The facts of the case as found by the learned judge and stated in the judgment, were as follows:

"The *Aldgate* arrived at Hull, was admitted to the Alexandra Dock, and had given a notice by July 23, 1907, at 9 A.M.; but she was not allowed by the ordinary regulations of the dock to go under the loading spout, where alone coal could be loaded, until midnight of the night between August 1 and 2. She was thereafter loaded, not without some delay and stoppage, but relatively small, and got away on August 7, and, therefore, if the vessel was entitled to claim that her lay hours commenced on July 23 at 9 A.M., she was on demurrage before she got under the spout and could be loaded at all; whereas, on the other hand, if her laying time did not commence until she got under the spout, then, having regard to the interposition of sundry excepted days, namely, Sunday and bank holiday, she would not have been upon demurrage. When she came to the

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port Hull was busy with coal. The plaintiff said that there were a good many ships, but not more than the railway and dock could have dealt with if properly organized, and Hull could have dealt with much more coal. Mr. Parkinson, agent at Hull for the Denaby and Cadeby Main Colliery, which was the colliery whose coals were designated for the ship's cargo, said that at this time there were difficulties arising from the condition of traffic on the railway. The colliery was turning out sufficient coal for the daily loading of such ships as could be loaded, but it had difficulty in leading the coal down to Hull owing to the railway company being short of engine power, as will happen to railway companies from time to time when their business is flourishing, and the provision of engine power has not been kept up in advance so as to deal with the traffic coming in.

"When coal was consigned from the colliery it was consigned to the office of the colliery agent at Hull, not ticketed or labelled or consigned to any particular ship, but consigned to Mr. Parkinson generally, so that he could direct it to be tipped into whatever ship happened to be under the tip at the time. The regulations of the dock almost necessarily required that ships which had to be loaded under a particular appliance should be loaded in their turn of arrival. It was said in terms by Mr. Parkinson that if the *Aldgate* had got under the tip earlier she would then have got the coal which came down earlier. There was coal at the tip, subject to casual delays there; there was coal coming down by the railway to the tip adequate for the supply of the vessels that got to the tip in their turn; and the conclusion of fact, therefore, at which I arrive upon the evidence is that what prevented the vessel from getting to the tip any earlier than the night of August 1 and 2 was the fact that there were other vessels in turn of arrival before her at Hull, and I accept also the evidence of the plaintiff that, though numerous, the ships were not more than the railway and dock could have dealt with if properly organized. The conclusion is that in the ordinary course of the business at the Hull dock the vessel took her turn, and, there happening to be other vessels in turn before her, she was thereby, and not otherwise, prevented from getting to the tip where she had to take her cargo any earlier than she did."

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Bailhache, K.C., and *L. Noad*, for the defendants. The lay hours commenced to run at 9 A.M. on July 23, when the ship was an arrived ship in the Alexandra Dock: *Monsen* v. *Macfarlane*(1); and she therefore came on demurrage before the loading commenced. The delay was due to the vessel having to wait her turn with the other ships that had previously arrived. That is not a cause which is ejusdem generis with the specific matters enumerated in the exceptions clause in the colliery guarantee: *In re Richardsons and Samuel.* (2)

Scrutton, K.C., and *Adair Roche*, for the plaintiff. Reading the charterparty and colliery guarantee together, the true view is that the lay hours did not begin until the ship got under the loading tip, and that view is supported by the judgment of Bigham J. in *Shamrock Steamship Co.* v. *Storey.* (3) But if that is not so, the charterer is protected by the exceptions in the colliery guarantee. The chief cause of the delay in loading was the disorganization on the railway, which is one of the matters expressly excepted. In so far as the cause was the presence of other vessels in the harbour, *Larsen* v. *Sylvester* (4), the facts of which are very similar to those of the present case, is an authority for saying that that was a cause beyond the control of the charterer within the general words in the guarantee, for *Larsen* v. *Sylvester* (4) shews that the use of those words excludes the application of the ejusdem generis rule. According to the principle laid down in *S.S. Knutsford, Ld.* v. *Tillmanns* (5), in order to apply that rule, it must be possible to find a genus or category within which all the matters specifically mentioned can be comprised: see the judgment of Farwell L.J. in the Court of Appeal. (6) If there is any one feature common to all the express exceptions in this guarantee, it is that they are all matters beyond the control of the charterer.

Bailhache, K.C., in reply. The decision in *Shamrock Steamship Co.* v. *Storey* (7), as appears from the judgment of Lord Russell

(1) [1895] 2 Q. B. 562.
(2) [1898] 1 Q. B. 261.
(3) (1898) 4 Com. Cas. 80.
(4) [1908] A. C. 295.
(5) [1908] A. C. 406.
(6) [1908] 2 K. B. 385, at p. 403.
(7) (1899) 5 Com. Cas. 21.

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of Killowen C.J. in the Court of Appeal, turned entirely on the express provision in the colliery guarantee in question that the time for loading did not begin to run until the ship was under the tip. The ejusdem generis rule was held to be excluded in *Larsen* v. *Sylvester* (1) by reason of the use of the words "of what kind soever," which are far wider than the general words in this case. [*Leonis Steamship Co.* v. *Rank* (2) was also referred to.]

HAMILTON J., after stating the facts as set out above, continued as follows: It is contended by the defendants that their vessel was what is called an arrived vessel on July 23 at 9 A.M., that her lay hours ran out before any coal was put on board, that after that she was loaded while she was on demurrage, that no exceptions in the contract prevented or suspended the running of the lay hours from July 23 at 9 A.M., and that if any matters within those exceptions arose after the loading began, as the vessel was already on demurrage, they do not avail to protect the charterer. On the other hand, the charterer says, firstly, that she was not an arrived vessel until she got under the tip, the risk of delay between arrival in dock and arrival under the tip being, under these two instruments, upon the ship; and, secondly, that the delay which occurred after the vessel arrived in dock is within the exceptions which prevent the lay hours from running; that when she began to load she was loaded with despatch and within her time; although there were some delays, comparatively small, which would be in themselves excepted under the same exceptions in the charterparty.

I will first deal with the question when was she an arrived vessel? The charterparty provides that she is to proceed to Hull, Alexandra Dock, as ordered by charterer; and the charterer selected the Denaby and Cadeby Main Colliery as the one whose coals were to be loaded. The colliery guarantee says: "Time not to count until after the said steamer is wholly unballasted and ready in dock to receive her entire cargo," "or any other cause beyond my control always excepted." "Time to count from 6 A.M. following the receipt of notice (in writing) of

(1) [1908] A. C. 295. (2) [1908] 1 K. B. 499.

readiness by Robert Thorman if the steamer is actually ready as above stipulated, and not before." I think that means that the time is to count when the vessel is wholly unballasted and ready in dock to receive her entire cargo, subject to the other stipulations as to notice in writing of readiness, and so forth. The charterparty itself is a charter to proceed to a named dock in a named port, and, unless the words "as ordered by charterer" alter it, she would have arrived at her destination under the ordinary rule when she was in the dock; but even if the words "as ordered by charterer" would bind the vessel to tender herself at the spot ordered by the charterer, I am still of opinion that the words in the guarantee fixing when time is to count, and fixing it negatively by a provision as to what is to happen before time is to count, would cause the time to run from the moment when she was wholly unballasted and ready in dock. I hold this on the construction of the charterparty and guarantee as well as on the authority of *Monsen* v. *Macfarlane* (1), where the charterparty incorporated a colliery guarantee indistinguishable on this point from the present case, except that there the designation of the spot to be selected by the charterers in the dock was much more distinct, and it was held that the time began to run as per colliery guarantee, giving direct effect to its words, after the ship was wholly unballasted and ready in dock at Grimsby, although the charterparty had stipulated that she was to proceed to a customary loading place in the Royal Dock, Grimsby, as required by charterers. It was argued, however, that upon the construction of the charterparty itself the ship was not an arrived ship until she got under the tip, and the case of *Shamrock Steamship Co.* v. *Storey* (2), was cited, in which Bigham J. said that the words in the charterparty to load "in the usual manner according to the custom of the place," "from such colliery or collieries as the charterers may direct," shewed that the time for loading was not to be deemed to run until the vessel was under the tip; but it is evident from the learned judge's observations (3), "whether my reading of the charterparty without the words

(1) [1895] 2 Q. B. 562.

(2) 4 Com. Cas. 80.

(3) Ibid. at p. 84; and see 5 Com. Cas., at pp. 23, 24

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as to the guarantee be right or wrong, the defendants are entitled to succeed," that his view was, and was intended to be, an obiter dictum. As a matter of fact the terms of the usual guarantee are not set out in the report, the only guide to them being the learned judge's finding on the evidence that the usual guarantee form provided that the time for loading was not to begin to run until after the vessel was under the tip, which would decide the matter in a way different from the present case.

The next contention was that, assuming the time began to run when the ship was wholly unballasted and ready in dock on July 23, the loading was prevented by causes which came within the exceptions in the colliery guarantee, which are in the following terms : " Strikes of pitmen or workmen, frosts or storms, and delays at spouts caused by stormy weather, and any accidents stopping the working, leading, or shipping of the said cargo, also restrictions or suspensions of labour, lock-outs, delay on the part of the railway company either in supplying wagons or leading the coals, or any other cause beyond my control, such stoppage occurring any time between the present date and actual completion of loading." One has to ask oneself first of all whether it is subject to the application of the canon of construction which is known as the ejusdem generis rule, and, if so, how is it to be construed, or whether there is anything in the clause which prevents the application of that canon of construction. The ejusdem generis rule is a canon of construction only. The object of it is to find the intention of the parties. The instrument, the nature of the transaction, and the language used must all have due regard given to them, and although it is a commonplace to observe it, I think it is important to bear in mind, first of all, that this is a clause of a kind very familiar in ordinary contracts of carriage or contracts connected with the carriage of cargoes ; secondly, that this is a charterparty which is of that class where the lay days are fixed or calculable, as distinguished from the class where the obligation is to load in a reasonable time under the circumstances. No doubt if the parties use language appropriate to the purpose, it is open to them to take a charterparty which provides for

fixed lay days in one clause and convert it by another into a charterparty to load in a reasonable time. Still, in considering what this instrument means, it has to be borne in mind that the charterparty is of the type which is favourable to the ship, by fixing the lay days, and that to interpret these exceptions upon that provision for fixed lay days as allowing any cause beyond the charterer's control to excuse him would in effect convert it into a charterparty of the opposite type, which is favourable to the charterer and less favourable to the ship.

The mere consideration that so many matters have been carefully enumerated (quite superfluously so, unless some restriction is placed on the subsequent words "any other cause beyond my control") would lead one to construe that clause according to the ejusdem generis rule, and to say that it was intended by the parties that the time should not count only if the various matters specifically enumerated, or any other cause, similar to them and beyond the charterer's control, interfered with the loading. The defendants relied upon the authority of *In re Richardsons and Samuel* (1), which is a decision of the Court of Appeal, and it appears to me that, apart from the conclusion which I have arrived at as to the construction of the words, this decision is binding on me because it was stated in the judgment of A. L. Smith L.J., and in no way qualified or departed from in the subsequent judgments, that "The contention that because the delay arose from the loading of the ships in the port in the order of their arrival the charterer is exempt cannot prevail, for it is impossible to treat delay arising from such a cause as due to accident to the railway or as coming within the term 'other causes beyond charterer's control.'" Even if that were a dictum unnecessary for the decision in that case, I should have hesitated long before refusing to follow it; but it appears to me that it was necessary for the decision, and as both the subsequent judgments begin by saying that they agree alike in the conclusion and reasoning of the first judgment, I must treat that as a decision of the Court. It is true that it is a decision upon words and also on facts to some extent different from the present case, but it appears to me to be as close to the

(1) [1898] 1 Q. B. 261.

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present case as one could expect the language of a different instrument to be, and to decide that, where there are some accidental matters followed by the words "other causes beyond charterer's control excepted," the other causes beyond the charterer's control must be construed in a limited sense with reference to the particular matters specified before, and that, that being so, the mere loading of the ship in the port in the order of its arrival, and therefore of necessity waiting its turn, although no doubt beyond the charterer's control, cannot be said to be within those words in the contract itself.

An argument has been advanced on behalf of the plaintiff that two subsequent cases, both of them decisions of the House of Lords, *Larsen* v. *Sylvester* (1) and *S.S. Knutsford, Ld.* v. *Tillmanns* (2), govern this case in his favour, and have in fact altered the law with regard to the construction of mercantile instruments according to the canon of ejusdem generis. It is said that the words in the present clause are not for any useful purpose distinguishable from those in *Larsen* v. *Sylvester* (1), and that a rule was laid down in *S.S. Knutsford, Ld.* v. *Tillmanns* (2) for the interpretation of such a clause as this, a rule, namely, which requires the discovery of some genus including, under one category, all the matters specifically enumerated before the general words can be construed as referring only to such category or such genus, or, in other words, that unless you can form one common category of all the preceding specific matters and connect the general words with it, the general words must be treated as detached from the preceding specific matters and be of a generality limited only by the actual language of the general words themselves.

It is true that the facts in *Larsen* v. *Sylvester* (1) as regards date, cargo, and locality are like those of the present case; but the resemblance or difference of the case for the present purpose must turn upon the words of the particular instrument. It is noticeable that in *Larsen* v. *Sylvester* (1), Lord Robertson having been careful to state, what no other member of the House had in any way expressly doubted, that the ejusdem generis doctrine of construction was both sound and valuable

(1) [1908] A. C. 295. (2) [1908] A. C. 406.

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and must be maintained, at the conclusion of the opinions the Lord Chancellor also stated (1) his concurrence in what Lord Robertson had said; and I think, therefore, that it is quite clear that the principle upon which the House of Lords proceeded, following in that respect the decision in the Court below, was to make no change in the accepted rule of construction, to cast no doubt upon either its utility or its application, but to recall that, contrary perhaps to what had been argued in that case and some others, this rule of construction is subordinate to the real ntention of the parties, and does not control it; that is to say, that the canon of construction is but the instrument for getting at the meaning of the parties, and that the parties, if they use language intimating such intention, may exclude the operation of this or, I suppose, any other canon of construction. Accordingly their Lordships found in the words "any other unavoidable accidents or hindrances of what kind soever," an attempt as strenuous as language could make it to indicate that the ejusdem generis rule, with which I daresay the parties were familiar, was not to be applied in that case. It may well be that the result of that was that there were two or three lines of surplusage in the charterparty, but when the parties said that "any other unavoidable accidents or hindrances of what kind soever beyond their control" were to be excepted, it was impossible to suppose that they had meant that some unavoidable accident or hindrances, although beyond their control, should still leave the charterers liable. The only question, therefore, in applying *Larsen* v. *Sylvester* (2) to the present case is to inquire whether there is any language in this guarantee of like strength and effect. I think there is not. Lower down in this guarantee there is the expression "Should the colliery be off work for any cause whatever, time not to count." In the form of guarantee, too, which I understand is generally used, at any rate on the Tyne, and is provided by the North of England United Coal Trade Association, the word "whatever" is imported into a clause corresponding with the clause in question in this case. Accordingly, I think it is quite reasonable to suppose that the parties entering into this guarantee were fully aware, having the English language at

(1) (1908) 13 Com. Cas. 328, at p. 333. (2) [1908] A. C. 295.

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command, that they might carry the matter considerably further if they used the word "whatever" (I express no opinion as to how far that would have carried it), and if they had chosen to use the expression "of what kind soever," it would pass the wit of man to find language more express or emphatic to indicate the utmost possible generality; but when they confine themselves to words of specific enumeration, like "any other cause beyond my control," I see nothing to derogate from the ordinary canon of construction that those words are subject to a limitation, namely, that of the genus or category which the previous words have indicated.

With regard to *S.S. Knutsford, Ld.* v. *Tillmanns* (1), it is to be observed that in the Court of Appeal, after a long and careful discussion as to how the ejusdem generis rule is to be applied to various classes of instruments, the Court came to the conclusion that there was a category in clause 4 of the bill of lading in question, and a common element applying to all the specific matters enumerated therein quite sufficient to enable the words "any other cause" to be brought within that category, although, whether you call it a category, with Farwell L.J., or a genus, as the other Lords Justices did, no doubt it was a category or a genus lacking in scientific precision; but they found a common element in the references to "ice, blockade, interdict, war, disturbances," and so forth, sufficient to enable them to construe the words "any other cause" as referable to the category so expressed. Considerable discussion arose there as to whether the presumption of law is that general words are general until they can be shewn to be particular, or whether general words are ejusdem generis with the particular words until they can be shewn to be general without any limitation. I do not think it is now necessary to embark upon that discussion. It arose there upon the citation of a case relating to an antenuptial settlement. When the case was taken to the House of Lords, I find that Lord Macnaghten said that "the rule of ejusdem generis applies as laid down in *Thames and Mersey Marine Insurance Co.* v. *Hamilton* (2), and I prefer to take the rule on a point of that sort from a case which did deal

(1) [1908] A. C. 406. (2) (1887) 12 App. Cas. 484.

with bills of lading and shipping documents, rather than from cases that dealt with real property and settlements," and the rule referred to is thus stated in *Thames and Mersey Marine Insurance Co.* v. *Hamilton* (1) by Lord Halsbury: "Two rules of construction now firmly established as part of our law may be considered as limiting those words. One is that words, however general, may be limited with respect to the subject-matter in relation to which they are used;"—that, of course, covers the observations which I ventured to make that this is a charter-party with fixed lay days—"the other is that general words may be restricted to the same genus as the specific words that precede them"; and Lord Halsbury added that "there is perhaps a third consideration which cannot be overlooked, and that is that where the same words have for many years received a judicial construction it is not unreasonable to suppose that parties have contracted upon the belief that their words will be understood in what I will call the accepted sense." As to that I may observe that *In re Richardsons and Samuel* (2) is a case which has long been known to shipping lawyers, and that in my experience the mercantile gentlemen who prepare these documents have a very competent knowledge of the decisions of the Courts in recent years. Then in the same case Lord Macnaghten said (3): "According to the ordinary rules of construction these words must be interpreted with reference to the words which immediately precede them. They were, no doubt, inserted in order to prevent disputes founded on nice distinctions." That object of the insertion of such words, I am afraid, has not been always successfully attained. "Their office is to cover in terms whatever may be within the spirit of the cases previously enumerated"; and then a little lower down: "If, on the other hand, that expression is to receive a limited construction, as apparently it did in *Cullen* v. *Butler* (4), and loss by perils of the seas is to be confined to loss ex marinæ tempestatis discrimine, the general words become most important. But still, ever since the case of *Cullen* v. *Butler* (4), when they first became the subject of judicial construction, they have

(1) 12 App. Cas. at p. 490.
(2) [1898] 1 Q. B. 261.
(3) 12 App. Cas. at p. 501.
(4) (1816) 5 M. & S. 461.

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always been held or assumed to be restricted to cases 'akin to,' or 'resembling,' or 'of the same kind as' those specially mentioned."

Now, following those observations, it seems to me there is nothing in *S.S. Knutsford, Ld.* v. *Tillmanns* (1) to raise any difficulty in the present case, except this, that one has now to look to see, if there be a genus, what that genus is. Mr. Scrutton contended that it must be a genus which is inclusive, and into which all the previous specifically enumerated matters will enter, and suggested that the expression of Collins L.J. at the end of his judgment in *In re Richardsons and Samuel* (2) must be taken as now modified in consequence of the decision in *S.S. Knutsford, Ld.* v. *Tillmanns.* (1) It does not appear to me that that is necessarily so. I do not understand that anything is laid down in *S.S. Knutsford Ld.* v. *Tillmanns* (1) which determines that in all instruments and under all circumstances the general words are referable to one category into which all the previously enumerated words must enter as component species, and I see no reason why either the nature of the instrument or the language used might not cause the general words to be referred to the specific words either collectively or in groups or individually according to the intention of the parties. It does not appear to me to be a matter of great difficulty to find a common category which will cover all the matters specifically inserted in the present case. It is not necessary that either genus or differentia should be of extreme scientific precision. Mr. Bailhache suggested as the distinction which would constitute a common category that the clause referred to hindrances on the landward side and not on the seaward side. That test is attractive because it is terse and pointed, but I think Mr. Scrutton pointed out with justice that, although it might be relatively unlikely in fact, hindrances which would come within this clause might arise on the seaward side, as, for example, if frosts or storms obstructed the passage of the ship from the dock to the tip, or if a strike of dock employees prevented the sluices or dock gates from being worked, or if an accident occurred, say the

(1) [1908] A. C. 406. (2) [1898] 1 Q. B. at p. 268.

sinking of a vessel at the tip which stopped the shipping of the cargo that was there. It appears to me that the common category which covers all this is to be found in the circumstance that the matters enumerated clearly all refer to something extraordinary, something in the nature of a casualty, something accidental or abnormal; not to something occurring in the ordinary course of a flourishing business, though detrimental to the ordinary course of business. That is a common feature quite as precise as the common feature which sufficed in *S.S. Knutsford, Ld.* v. *Tillmanns* (1)—a common feature with an effective business object, and a common feature which excludes the cause of the detention of this vessel upon the evidence of the plaintiff himself, because what, as I find as a fact, prevented the vessel from getting to the tip was that she had to wait her turn. What obliged her to wait her turn was the fact that other vessels had come in before her, and I find as facts that other vessels had come in before her in the ordinary course of the trade of the port, which must have its fluctuations, and was at that time in an exceptionally flourishing condition; that the other vessels had come in the ordinary course of trade, and would have been dealt with without delay in the ordinary course of trade if the railway and the dock, which means the railway lines and appliances at the tip, had been properly organized and managed; and that although there was congestion and delay on the part of the railway company during this period, that was not the cause of the vessel not getting to the tip, because if it had not been that there had been other vessels in turn before her she would have got straight to the tip, and then would have found coal available for her, the railway congestion notwithstanding.

It seems to me therefore, that reliance cannot be placed in aid of the charterer upon the exceptions in the colliery guarantee, and, that being so, I do not think it necessary to consider the length of time during which it is said that after loading began there was delay on the part of the railway company in supplying wagons or leading the coal; it does not appear to me that they are of any significance, the conclusion having been arrived at

(1) [1908] A. C. 406.

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that the vessel was already on demurrage before any coal was put on board at all. The result is that there must be judgment for the defendants upon the counter-claim.

Judgment for defendants on the counterclaim.

Solicitors for plaintiff: *Maples, Teesdale & Co., for Bramwell, Bell & Clayton, Newcastle-on-Tyne.*

Solicitors for defendants: *W. A. Crump & Son, for A. M. Jackson & Co., Hull.*

F. O. R.

1910
Jan. 12.

MAYOR, &c., OF THE METROPOLITAN BOROUGH OF CAMBERWELL, APPELLANTS *v.* DIXON, RESPONDENT.

London—Streets—Paving Expenses—Laying out Street without Sanction of London County Council—"New street laid out or made"—Charging estimated Expenses on Frontagers—Metropolis Management Act, 1855 (18 *&* 19 *Vict. c.* 120), *s.* 105—*London Building Act,* 1894 (57 *&* 58 *Vict. c. ccxiii.*), *ss.* 7, 213.

By s. 105 of the Metropolis Management Act, 1855, the vestry or district board of a parish or district (now the metropolitan borough council) may pave "any new street laid out or made or hereafter to be laid out or made," and charge the frontagers with the estimated expenses thereof. By s. 7 of the London Building Act, 1894, "no person shall commence to form or lay out any street for carriage traffic or for foot traffic without having obtained the sanction of the" London County Council; and s. 200 imposes a penalty for a breach of the above provision. By s. 213, "nothing in this Act shall take away or interfere with the powers of the local authorities with respect to the paving of new streets under the Metropolis Management Acts."

A public road, which before 1907 had been widened, with the sanction of the London County Council, to a width of 20 feet, was in 1907 further widened to a total width of 40 feet, and was laid out as a street without the sanction but with the knowledge of the London County Council, and houses were erected on each side. The appellants, within whose district the street lay, thereupon decided to pave the street as a new street under s. 105 of the Metropolis Management Act, 1855, and apportioned the estimated expenses among the frontagers. The respondent, who was one of the frontagers, contended that, as the street had been formed and laid out without the consent of the London County Council, it had been illegally formed and laid out, and that therefore s. 105 of the

Act did not apply so as to entitle the appellants to apportion the expenses:—

Held, that as the street was in fact a new street the appellants had power under s. 105 of the Act of 1855 to pave it and to apportion the estimated expenses among the frontagers.

CASE stated by a metropolitan police magistrate.

At a Court of summary jurisdiction held at the Lambeth police court, within the metropolitan district, the respondent was summoned by the appellants to answer a complaint made on their behalf by the town clerk under the Metropolis Management Act, 1855, that the respondent had unlawfully neglected and refused to pay the sum of 14*l.* 3*s.* 1*d.*, being the sum apportioned by the appellants to be paid by the respondent as the owner of No. 25, The Poplars, on the north-east side of Ruskin Walk, in the metropolitan borough of Camberwell, as a contribution towards the estimated expense of paving part of Ruskin Walk, which was alleged by the appellants to be a new street.

Upon the hearing the following facts were admitted or proved:—

Before and down to the year 1889 a footpath, about five feet wide, which was a public way before 1855, and which was then known as Simpson's Alley, led from Half Moon Lane, in the borough of Camberwell, to Herne Hill, then in the parish of Lambeth, but now in the borough of Camberwell.

In or about the year 1889 that portion of Simpson's Alley at the Half Moon Lane end thereof, which extended for a distance of about 100 feet from Half Moon Lane to Warmington Road, was, with the sanction of the London County Council, widened on the north-east side to a width of 20 feet or thereabouts from the centre of Simpson's Alley.

In or about the year 1891 that portion of Simpson's Alley which extended from Warmington Road to a distance of about 550 feet was, with the sanction of the London County Council, widened on the north-east side thereof to a width of 20 feet or thereabouts from the centre of the then existing path. (1) The name of Simpson's Alley was subsequently changed to Ruskin Walk.

(1) The magistrate stated in his judgment, which was annexed to the case, that the road was then used for carriage traffic.

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CAMBERWELL CORPORATION v. DIXON.

In or about the year 1907 Ruskin Walk, which had been widened as above mentioned, was widened on the south-west side, without the sanction but with the knowledge of the London County Council, to a total width of about 40 feet. The provisions of s. 13 of the London Building Act, 1894, were complied with. Since it was widened in 1907 a row of houses was erected along each side (1), and the respondent was the owner of one of those known as The Poplars, 25, Ruskin Walk.

On January 20, 1909, the appellants by resolution decided to pave part of Ruskin Walk as a new street under the provisions of the Metropolis Management Act, 1855, and the Acts amending the same. The estimated expenses thereof were apportioned and charged upon the owners of the houses and land forming, bounding, or abutting on such part of the street as was resolved to be paved, and the amount so apportioned to the respondent was the sum of 14*l.* 3*s.* 1*d.* This sum was demanded of the respondent, but was not paid.

The appellants contended that Ruskin Walk was a new street within the meaning of the Metropolis Management Act, 1855, and the Acts amending the same; that it was immaterial for the present purpose whether or not the express sanction of the London County Council had been obtained to the widening which took place in 1907; and that the appellants were entitled to recover the sum of 14*l.* 3*s.* 1*d.* from the respondent.

The respondent contended that Ruskin Walk was illegally formed and laid out as a street, inasmuch as it had been so formed and laid out without the sanction of the London County Council and contrary to the provisions of ss. 6, 7, 8, 9, 10, and 11 of the London Building Act, 1894 (2), and that the appellants

(1) A plan of Ruskin Walk was annexed to the case, and it shewed that twenty-five houses were erected on the north-east side and eighteen houses on the opposite side.

(2) 57 & 58 Vict. c. ccxiii., s. 6: "From and after the commencement of this Act streets shall not be made and ways shall not be widened, altered, or adapted so as to form streets otherwise than subject to and in accordance with the provisions set forth in this part of this Act. Provided that this Act shall not affect the powers of any local authority to widen, alter, or improve any street."

Sect. 7: "Before any person commences to form or lay out any street, whether intended to be used for carriage traffic or for foot traffic only, such

were not entitled in law to enforce against the respondent a claim for paving expenses of a street which had been so illegally formed and laid out.

The magistrate was of opinion that, as Ruskin Walk had been formed and laid out as a street in 1907 without the sanction of the London County Council having been applied for or obtained under the London Building Act, 1894, it had therefore been illegally formed and laid out as a street, and that it followed that the appellants were not entitled in law to enforce against the respondent their claim for payment of the sum of 14*l.* 3*s.* 1*d.* apportioned to him in respect of the estimated expenses of paving the street or part thereof, and he accordingly dismissed the summons. (1)

The question for the opinion of the Court was whether upon the above facts the magistrate came to a right determination in point of law.

Macmorran, K.C. (*Fleetwood Pritchard* with him), for the appellants. For the purposes of this case it must be assumed that Ruskin Walk is a new street in fact, but it is said that because the consent of the London County Council was not

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person shall make an application in writing to the council for their sanction to the formation or laying out of such street either for carriage traffic or for foot traffic (as the case may be):

"Every such application shall be accompanied by plans and sections with such particulars in relation thereto as may be required by printed regulations issued by the council, and the council shall forthwith communicate every such application to the local authority:

"And no person shall commence to form or lay out any street for carriage traffic or for foot traffic without having obtained the sanction of the council."

By s. 5, "the Council" means the London County Council.

By s. 200, sub-s. 1, every person who commences to form or lay out . . . . any street without having first obtained the sanction of the London County Council shall be liable to a penalty.

Sect. 213: "Nothing in this Act shall take away or interfere with the powers of the local authorities with respect to the paving of new streets under the Metropolis Management Acts."

(1) The magistrate said in his judgment that there were other points taken by the respondent before him, but that in his view of the case it was unnecessary to discuss them, and that the respondent might raise them again if necessary.

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obtained to its being formed and laid out as a street the provisions of s. 105 of the Metropolis Management Act, 1855, do not apply. No doubt s. 7 of the London Building Act, 1894, contains a prohibition against any person commencing to form or lay out a street without the sanction of the London County Council, and s. 200 imposes a penalty upon any person who violates that provision. But the two Acts deal with totally different matters. The duty of the local authority—in this case the appellants—under s. 105 of the Metropolis Management Act, 1855, is to see if in fact a road is a "new street," and if it is they have power to pave it and to apportion and charge the estimated expenses thereof upon the frontagers. The fact that a person has formed or laid out a street without having obtained the consent of the London County Council renders him liable to a penalty, but it does not affect the powers of the local authority under s. 105 of the Act of 1855. Moreover, s. 213 of the London Building Act, 1894, expressly provides that nothing in the Act is to take away or interfere with the powers of the local authorities with respect to the paving of new streets under the Metropolis Management Acts. The decision of the learned magistrate was therefore wrong.

Danckwerts, K.C. (*R. D. Muir* with him), for the respondent. The words in s. 105 of the Metropolis Management Act, 1855, "any new street laid out or made," means any new street lawfully laid out or made. This street having been formed and laid out in violation of the express prohibition contained in s. 7 of the London Building Act, 1894, has been illegally formed and laid out, and therefore the provisions of s. 105 of the Act of 1855 do not apply to it. Sect. 7 of the Act of 1894 intends that all new streets shall be formed and laid out according to plans and sections approved by the London County Council, and if a street is formed or laid out without the sanction of the London County Council, the Attorney-General can, at the instance of that body, bring an action for an injunction to restrain the use of the street as a street. If the contention on behalf of the appellants is correct, the local authority can, by paving a street which has been illegally laid out and thus making it a highway repairable by the inhabitants at large, with the consequent right of the public to use it, defeat the action of the Attorney-General at the

instance of the London County Council. The street having been illegally laid out, s. 105 of the Act of 1855 does not apply so as to entitle the appellants to apportion the estimated expenses of paving it among the frontagers. The decision of the magistrate was right. [*Robertson* v. *Bristol Corporation* (1), s. 112 of the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102) (definition of "new street"), and ss. 6, 9, and 11 of the London Building Act, 1894, were also referred to.]

Macmorran, K.C., was not called upon to reply.

LORD ALVERSTONE C.J. In this case I am of opinion that the ground upon which the learned magistrate declined to proceed further with the case does not afford good reason for his so declining. At the date when the summons was issued there was in fact a public road known as Ruskin Walk, 40 feet in width, which extended from Half Moon Lane some distance in a direction towards Herne Hill. That road had been widened at different times. On one side of the road so widened there were twenty-five houses, and on the opposite side eighteen houses, and so far as one can judge—but without expressing any opinion upon it, because that question may come before the magistrate for determination hereafter—it has all the appearance of a street. The magistrate has not determined whether it is or is not a street in fact; he has held that it cannot be considered to be a street at all, because the sanction of the London County Council as required by s. 7 of the London Building Act, 1894, has not been given to the formation of the street, and that therefore the claim against the respondent, under s. 105 of the Metropolis Management Act, 1855, to recover his proportion of the estimated expenses of paving the road cannot be maintained.

I am anxious not to express an opinion upon any question other than that which is raised in the case, because the magistrate has stated in his judgment that there were other points taken by the respondent upon which he expressed no opinion, and as our judgment is against the respondent upon the point now before us, he will be entitled to raise those other matters before the magistrate when the case goes back to him.

(1) [1900] 2 Q. B. 198.

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It is not disputed that under ordinary circumstances the question whether a street is a "new street" is a question of fact, as indeed has been already decided with regard to the expenses of paving a new street under this section, and it is not suggested that, apart from the London Building Act, 1894, there was not evidence that this was a new street within the meaning of s. 105 of the Metropolis Management Act, 1855. The only question before us is whether the magistrate was right in holding that, because the street was formed and laid out without the sanction of the London County Council and is therefore supposed to be an illegally formed street, it does not come within s. 105 of the Act of 1855 so as to entitle the appellants to recover from the respondent the estimated expenses of paving it. I have some difficulty in understanding on what ground the magistrate has come to that conclusion. It is quite true that s. 6 and the following sections of the London Building Act, 1894, contain a prohibition against the formation or laying out of a street unless plans have been submitted to the London County Council and their sanction has been obtained, and by s. 200 a penalty is imposed upon any person who commences to form or lay out a street without having first obtained the requisite sanction. Why the sanction of the London County Council was not obtained in this case does not appear. There is, however, a provision in s. 213 of the London Building Act, 1894, which says that "nothing in this Act shall take away or interfere with the powers of the local authorities with respect to the paving of new streets under the Metropolis Management Acts."

The contention on behalf of the respondent is that the words "new street laid out or made" in s. 105 of the Metropolis Management Act, 1855, mean a new street lawfully laid out or made, and that, if it is a street unlawfully laid out or made in the sense that the Attorney-General or the London County Council through the Attorney-General can obtain an injunction to restrain the use of it as a street, s. 105 does not apply to such a street, and the expenses of paving it cannot be charged upon the frontagers. I cannot agree with that contention. In my opinion, when once the magistrate has found that the street is in fact a new street, the local authority have power to pave it

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and charge the expense of so doing on the frontagers. If there is in fact a new street the provisions of the London Building Act, 1894, do not of themselves prevent the local authority from exercising the powers conferred upon them by s. 105 of the Act of 1855. The suggestion that this street will from henceforth become repairable by the inhabitants at large though the sanction of the London County Council has not been obtained to its formation is not relevant to the question before us and cannot affect our decision upon that question. The appeal must therefore be allowed, and the case must be remitted to the magistrate to be dealt with on the merits.

BUCKNILL and BRAY JJ. agreed.

Appeal allowed.

Solicitors for appellants: *Marsden & Son.*
Solicitors for respondent: *Rowe & Maw.*

W. F. B.

MAY *v.* WATERS.

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Jan. 19.

Game—Ground Game—Right of killing Ground Game—"Under this Act or otherwise"—Grantee of Right not being Occupier—Ground Game Act, 1880 (43 *& 44 Vict. c.* 47), *s.* 6.

Sect. 6 of the Ground Game Act, 1880, after providing that no person having a right of killing ground game under the Act or otherwise shall use any firearms for the purpose of killing ground game between certain hours, proceeds to enact that no such person shall, for the purpose of killing ground game, employ spring traps except in rabbit holes:—

Held, that this enactment does not apply to a grantee of the right to kill and take ground game where the grantee is not the occupier of the land over which the right is granted.

CASE stated by the justices of Cornwall.

The appellant was on October 30, 1909, convicted on an information preferred by the respondent charging the appellant under s. 6 of the Ground Game Act, 1880 (1), with unlawfully

(1) The Ground Game Act, 1880 (43 & 44 Vict. c. 47), s. 6: "No person having a right of killing ground game under this Act or

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on September 21, 1909, employing otherwise than in rabbit holes 134 spring traps for the purpose of killing rabbits.

At the hearing of the information the following facts were proved:—

(1.) The appellant had, under a lease dated December 12, 1908, and made between John Davies Enys of the one part and the appellant of the other part, the exclusive right of killing rabbits on certain sand-hills (adjoining a farm of which he was the tenant) in the parish of Perranzabuloe, the said sand-hills being uncultivated land of a sandy nature on which short herbage grew upon which rabbits thrived, and also rough grass, furze, and fern. The appellant sold the rabbits which he caught by trapping.

(2.) On September 21, 1909, the respondent, in company with a police constable, visited the appellant and requested to be allowed to see how the appellant's traps were set on the sand-hills, which the appellant consented to.

(3.) There were found 137 spring traps set for the purpose of killing rabbits, of which 134 were set outside rabbit holes.

(4.) The appellant did not dispute the fact that the traps were set for the purpose of killing rabbits, nor that they or some of them were set outside rabbit holes.

(5.) On the part of the appellant it was contended by his solicitor that s. 6 of the Ground Game Act, 1880, does not apply to land such as that in which the appellant's traps were set, but only to enclosed cultivated land, and that the appellant could not therefore be convicted.

(6.) It was further contended on the part of the appellant that he was not a "person" within the meaning of s. 6 of the statute, but that, having the exclusive right of killing rabbits on the sand-hills by grant from the owner under the before-

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otherwise shall use any firearms for the purpose of killing ground game between the expiration of the first hour after sunset and the commencement of the last hour before sunrise; and no such person shall, for the purpose of killing ground game, employ spring traps except in rabbit holes, nor employ poison; and any person acting in contravention of this section shall, on summary conviction, be liable to a penalty not exceeding 2*l*."

mentioned lease, he was entitled to set his traps where he pleased for the purpose of killing rabbits.

(7.) The justices' attention was directed to *Smith* v. *Hunt*. (1)

(8.) The justices were of opinion that, there being no specific words in s. 6 of the Act confining its operation to enclosed cultivated land, the Act applies to lands of the nature of the sand-hills occupied by the appellant as before mentioned.

(9.) The justices were further of opinion that the appellant was a "person" within the meaning of s. 6, and that the case of *Smith* v. *Hunt* (1) had no bearing upon the information before them. They therefore convicted the appellant.

The question for the opinion of the Court was whether the justices came to a correct determination in point of law.

The lease was dated December 12, 1908, and was made between John Davies Enys, of Enys, in the county of Cornwall, thereinafter called the lessor, of the one part, and Thomas Henry May, of Reen Farm, in the parish of Perranzabuloe, in the same county, thereinafter called the lessee, of the other part. The lessor thereby granted unto the lessee the exclusive right to kill and take rabbits on the warren known as Reen Sands and such of the lands immediately adjoining thereto as were set out in a schedule thereon indorsed, excepting and thereout reserving to the lessor all mines, minerals, ores, sand, clays, marl, brick, earth, quarries of stone and slate, and gravel beds, and all waters, streams, rivulets and watercourses, with full power for the lessor to enter upon the said premises and to dig and search for minerals, sand, clay, &c., and the same to dress, work, and carry away, making compensation for damage, if any, occasioned thereby, and to do all acts necessary or desirable for mining purposes, with like power to take again into his possession any part of the said land for planting, building, or for any other purpose, such abatement of rent being made for the same as two indifferent persons, one to be chosen by each party, or a third person to be chosen by them as umpire before proceeding upon a valuation, should adjudge reasonable. There was also reserved to the lessor liberty at all reasonable times to enter upon and inspect the said premises for any purpose or purposes whatsoever. The tenendum was unto

(1) (1885) 16 Cox, C. C. 54; 54 L. T. 422.

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the lessee for the term of seven years from December 25, 1908, subject, however, to determination as was thereinafter provided for, Yielding and paying unto the lessor the clear rent or sum of 27*l.* per annum clear of all deductions except landlord's property tax and tithe rent-charge payable quarterly on the usual quarter days. The lessee covenanted to pay the rent and to pay and discharge the land tax, redeemed or unredeemed, and all other taxes, rates, assessments, and outgoings whatsoever except as aforesaid, and to put and keep in repair certain fences and to provide and fix such wire netting as might reasonably be required for keeping in the rabbits; and it was expressly agreed between the parties that the lessor reserved for himself or any persons whom he might appoint the exclusive right to depasture cattle, sheep, or other animals on the said warren and lands, and also the exclusive right to kill and take game thereon.

H. M. Sturges, for the appellant. This conviction ought to be quashed. The restrictions and penalty imposed by s. 6 of the Ground Game Act, 1880, do not apply to a grantee or lessee of sporting rights not being in occupation of and engaged in cultivating the land. The Act is "An Act for the better protection of occupiers of land against injury to their crops from ground me," and the preamble recites that "it is expedient in the interests of good husbandry, and for the better security for the capital and labour invested by the occupiers of land in the cultivation of the soil, that further provision should be made to enable such occupiers to protect their crops from injury and loss by ground game." The Act then proceeds to enact that every occupier of land shall have, as incident to and inseparable from his occupation of the land, the right to kill and take ground game thereon, concurrently with any other person who may be entitled to kill and take ground game on the same land. Then follow certain limitations upon this enactment, which are not material to the present case. Sect. 2 deals with occupiers of land entitled otherwise than in pursuance of the Act to kill and take ground game thereon. These occupiers may, subject to the restrictions in s. 6, exercise any other or more extensive right which they may possess in respect of ground game or any other game as if

the Act had not passed; and if they shall give to any other person a title to kill and take ground game they are nevertheless to retain and have as incident to and inseparable from their occupation the same right to kill and take ground game as is declared in s. 1 of the Act.

The whole intention of the Act is to place in the hands of the occupying tenant of the land engaged in the cultivation of it the means of protecting his crops from loss and injury from ground game. He is the person upon whom the restrictions in s. 6 are imposed. They have no application to the owner of the land. This is so even though he may be the occupier—*Smith* v. *Hunt* (1)—except in the case where the shooting rights are vested in some other person: *Anderson* v. *Vicary*. (2) The exemption of the owner extends to the grantee of his sporting rights, unless that grantee is the occupier of the land and derives his rights from the mere fact that the owner has not reserved the sporting rights in the lease or agreement under which the occupier holds, as in *Saunders* v. *Pitfield*. (3) He is then a person having a right of killing ground game otherwise than under the Act, within the meaning of the words at the beginning of s. 6, and belongs to the class of persons dealt with by s. 2. The appellant is not the occupier of the land and the restrictions of s. 6 have no application to him.

Stuart Bevan, for the respondent. The conviction should be affirmed. Sect. 6 of the Act is quite general in its terms. It provides that no person having a right of killing ground game under the Act or otherwise shall use firearms as prohibited, and that "no such person" shall employ spring traps except in rabbit holes. The appellant was a person having a right of killing ground game otherwise than under the Act, namely, by grant from the owner. In no other wise did the respondent in *Saunders* v. *Pitfield* (3) acquire the right, and he was held to be bound by the restrictions in s. 6.

LORD ALVERSTONE C.J. This conviction must be quashed. If the Act of 1880 had intended to interfere with the rights of the

(1) 16 Cox, C. C. 54; 54 L. T. 422.
(2) [1900] 2 Q. B. 287.
(3) (1888) 16 Cox, C. C. 369; 58 L. T. 108; 52 J. P. 694.

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owner of land who keeps the sporting rights in his own occupation, or the rights of a shooting tenant under a grant of shooting rights from the owner, clearer language would have been used. The object of the Ground Game Act, 1880, was to give to occupiers of land better protection against injury to their crops from ground game. That appears clearly from the title to the Act, and also from the preamble, which recites that it is expedient in the interests of good husbandry, and for the better security for the capital and labour invested by the occupiers of land in the cultivation of the soil, that further provision should be made to enable such occupiers to protect their crops from injury and loss by ground game. With that object in view the Legislature proceeds to enact by s. 1 that every occupier of land shall have, as incident to and inseparable from his occupation of the land, the right to kill and take ground game thereon, concurrently with any other person who may be entitled to kill and take ground game on the same land. Certain limitations are then imposed on this right; it is only to be exercised by the occupier himself or a servant or member of his household resident upon the land. Sect. 2 of the Act deals with occupiers who have independently of the Act the right to kill and take ground game and with their power to give to other persons the title to exercise that right, and provides that if such an occupier shall give to any other person a title to kill and take ground game he shall nevertheless retain and have, as incident to and inseparable from his occupation, the same right as is declared by s. 1. In other respects, but subject to the provisions of s. 6, an occupier may exercise any other or more extensive right which he may have in respect of ground game or other game in the same manner and to the same extent as if the Act had not passed. By s. 3 all agreements in contravention of the right given to the occupier by the Act are declared void. Sect. 4 renders it unnecessary for the occupier to have a game licence. Sect. 5 saves the rights of those persons, other than the occupier, who at the passing of the Act had by lease or contract the right to kill and take ground game, until the termination of their lease or contract. It is clear that these five sections are concerned with conferring a right upon the occupying tenant. They

do not purport, otherwise than is necessary to attain that object, to affect the position of the owner of the land who retains the sporting rights over it.

I come now to s. 6. The first clause of that section provides that no person having a right of killing ground game under this Act or otherwise shall use any firearms for the purpose of killing ground game between the expiration of the first hour after sunset and the commencement of the last hour before sunrise. Those words were clearly intended to impose a restriction upon the exercise of the right already conferred by the former sections upon the occupier of land. It is a restriction imposed upon the occupier of land for the benefit of those who under normal conditions enjoyed the general sporting rights over the land, that is to say, the owner of the land or the grantee or lessee from him of the sporting rights. It is hardly conceivable that the restriction is imposed upon the owner of the land who retains in his own occupation both the land and the sporting rights over it. Then follow the words upon which the present case arises, "and no such person shall, for the purpose of killing ground game, employ spring traps except in rabbit holes; . . . ." Now, if Mr. Bevan's contention is correct, those words impose a general prohibition against any person whomsoever using spring traps except in rabbit holes. But if a general prohibition was intended, why is it expressly imposed only upon "any such person"? The answer that those words refer back to the earlier words in the section, "person having a right of killing ground game under this Act or otherwise," does not remove the difficulty unless those words involve a general prohibition, which they have been held not to do. It was held in *Smith* v. *Hunt* (1) that they do not include the owner who is in occupation of his own land and has retained the sporting rights. Unless we are prepared to overrule that case we must hold that the Ground Game Act, 1880, was not intended to impose the restrictions in s. 6 upon the owner of the land in possession of the sporting rights or the lessee or grantee from him of those rights who possesses or acquires those rights independently of the occupation of the land. The case of

(1) 16 Cox, C. C. 54; 54 L. T. 422.

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Saunders v. *Pitfield* (1) appears at first sight to throw some doubt on this conclusion, because in that case, as reported in the *Justice of the Peace* (2), A. L. Smith J. speaks of the occupier of the land as a tenant who "by his agreement" got the right to the game, and holds that such a tenant is within the prohibitions of s. 6 of the Act. If it had been the fact in that case that the tenant had acquired the right to the game by express grant from the owner, that case would seem to that extent to be in Mr. Bevan's favour. But it is clear from the statement in the special case in *Saunders* v. *Pitfield* (1) that the tenant did not acquire that right by any special grant from the owner, but merely by virtue of a tenancy agreement in which the landlord did not reserve those rights. The tenant therefore came within the words of the Act "occupier of land." Accordingly that case is no authority that an owner of land in possession of the sporting rights, or the lessee or grantee from him of those rights, is in the exercise of those rights liable to the restrictions or subject to the penalties of s. 6 of the Act. The case of *Anderson* v. *Vicary* (3) does not affect this case except in so far as it affirms the authority of *Smith* v. *Hunt.* (4) For these reasons I think the conviction should be quashed.

BUCKNILL J. I am of the same opinion. This Act does not impose the restrictions of s. 6 upon the owner of land who is also the owner of the sporting rights, or upon any person whom such an owner invests with those rights.

BRAY J. I agree. The restrictions in s. 6 of the Act apply only to occupiers of land and the other persons who by the Act may be authorized in writing by the occupier. In the present case the appellant was not in any sense the occupier of the land.

Appeal allowed.

Solicitors for appellant: *Rawle, Johnstone & Co., for Smith, Paul & Sitwell, Truro.*

Solicitor for respondent: *S. G. Polhill.*

(1) 16 Cox, C. C. 369; 58 L. T. 108; 52 J. P. 694.
(2) 52 J. P. at p. 695.
(3) [1900] 2 Q. B. 287.
(4) 16 Cox, C. C. 54; 54 L. T. 422.

W. H. G.

THE KING *v.* THE JUSTICES OF YORKSHIRE (WEST RIDING). *Ex parte* SHACKLETON.

1910
Jan. 19.

Motor Car—Licence—Indorsement—Offence in connection with the driving of a Motor Car—Obstruction of Highway—Motor Cars (Use and Construction) Order, 1904—*Motor Car Act*, 1903 (3 *Edw.* 7, *c.* 36), *s.* 4.

A breach of art. IV. of the Motor Cars (Use and Construction) Order, 1904, in allowing a motor car to stand on a highway so as to cause an unnecessary obstruction thereof is not an offence in connection with the driving of a motor car within the meaning of s. 4 of the Motor Car Act, 1903; and therefore a driver who, after being convicted of that breach of the Order of 1904, refuses to produce his licence for the purposes of indorsement cannot be convicted of an offence under the Motor Car Act, 1903.

Rule calling upon the justices of Yorkshire (West Riding) to shew cause why a writ of certiorari should not issue to remove into the King's Bench Division a certain record of conviction dated August 11, 1909, whereby one Ernest Shackleton was convicted for that he on July 14, 1909, at the township of Bingley, having been that day convicted of an offence in connection with the driving of a motor car (other than a first or second offence consisting solely of exceeding a limit of speed), did within a reasonable time thereafter fail to produce his licence for the purposes of indorsement. The grounds on which the rule was applied for were that the justices had no jurisdiction to make any indorsement on the licence inasmuch as the applicant had not been convicted of any offence in connection with the driving of a motor car.

From the affidavits in support of the rule the following facts appeared:—Ernest Shackleton was a motor van driver. On July 14, 1909, he was convicted at the Bingley police court of the following offence, namely, that he, having charge of a motor car then used on a highway called Park Road, did allow the same to stand on the said highway so as to cause an unnecessary

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obstruction thereof contrary to art. IV., s. 2, of the Motor Cars (Use and Construction) Order, 1904. (1)

After the conviction the clerk to the justices asked Shackleton to produce his licence for the purposes of indorsement of the conviction thereon pursuant to s. 4 of the Motor Car Act, 1903. (1) Shackleton refused to produce the licence.

On August 11, 1909, Shackleton was convicted at the Bingley police court of the following offence, namely, that he on July 14, in the township of Bingley, having been that day convicted of an offence in connection with the driving of a motor car (other than a first or second offence consisting solely of exceeding any limit of speed), then and there and within a reasonable time thereafter did fail to produce his licence for the purposes of indorsement.

In their affidavit in answer to the rule to shew cause the

(1) By s. 6, sub-s. 1, of the Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), the Local Government Board may make regulations with respect to the use of light locomotives on highways, and their construction, and the conditions under which they may be used. By s. 7 of the same Act a breach of any by-law or regulation made under the Act, or of any provision of the Act, may, on summary conviction, be punished by a fine not exceeding ten pounds.

The Motor Cars (Use and Construction) Order, 1904 (1904, No. 315), made under the above enactment contains the following among other provisions:—

"Article IV.: Every person driving or in charge of a motor car when used on any highway shall comply with the regulations hereinafter set forth; namely,— . . . .

"(2.) He shall not . . . . allow the motor car . . . . to stand on such highway so as to cause any unnecessary obstruction thereof."

Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 4:

"(1.) Any Court before whom a person is convicted of an offence under this Act, or of any offence in connection with the driving of a motor car, other than a first or second offence, consisting solely of exceeding any limit of speed fixed under this Act— . . . . (c) if the person convicted holds any licence under this Act, shall cause particulars of the conviction and of any order of the Court made under this section to be indorsed upon any licence held by him, and shall also cause a copy of those particulars to be sent to the council by whom any licence so indorsed has been granted.

"(2.) Any person so convicted, if he holds any licence under this Act, shall produce the licence within a reasonable time for the purposes of indorsement, and if he fails to do so shall be guilty of an offence under this Act."

justices relied on art. IV., s. 2, of the Motor Cars (Use and Construction) Order, 1904, and contended that Shackleton's breach of that regulation was an "offence in connection with the driving of a motor car" within the meaning of s. 4 of the Motor Car Act, 1903.

E. L. Barnes (*McCardie* with him), in support of the rule. The present case is indistinguishable in principle from *Rex* v. *Lyndon* (1), where it was held that leaving a motor car unattended and thereby wilfully obstructing the free passage of a highway, which is an offence punishable under s. 72 of the Highway Act, 1835 (5 & 6 Will. 4, c. 50), is not an offence "in connection with the driving of a motor car" within the meaning of s. 4 of the Motor Car Act, 1903. The words "any offence in connection with the driving of a motor car" do not prima facie include an offence of leaving a motor car stationary; and inasmuch as the offence of obstructing a highway is punishable not only under the Highway Act, 1835, but also under the Motor Car Acts and the regulations of the Local Government Board made thereunder, there is no reason for giving s. 4 of the Motor Car Act, 1903, any other than its natural meaning.

LORD ALVERSTONE C.J. In this case we must follow the decision in *Rex* v. *Lyndon*. (1) The words "any offence in connection with the driving of a motor car" when read with their context in s. 4 of the Motor Car Act, 1903, point to offences connected with the handling or manipulation of the car in the process of driving it. Inasmuch as a person wilfully obstructing the free passage of a highway may be convicted under other statutes independently of the Motor Car Acts and the regulations made under them, there is no reason for construing the words in question so as to include that offence. It seems more reasonable to take them as applying to offences in respect of the actual locomotion of the car, and not as including the mere leaving of the car at rest in the highway, which cannot properly be said to be an offence in connection

(1) (1908) 72 J. P. 227.

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with the driving of the car. The rule will be made absolute to quash the conviction.

BUCKNILL and BRAY JJ. concurred.

Conviction quashed.

Solicitors for applicant: *Jaques & Co., for Sutcliffe & Trenholme, Bradford.*

Solicitors for justices: *Bell, Brodrick & Gray.*

W. H. G.

1909
June 9.

THAMES CONSERVATORS, APPELLANTS *v.* GRAVESEND CORPORATION, RESPONDENTS.

Local Government—Sanitary Authority—Sewage flowing into River Thames—"Caused or suffered"—Thames Conservancy Act, 1894 (57 & 58 *Vict. c. clxxxvii.*), *s.* 94.

Sewage passed from the premises of private persons and from premises belonging to the respondents, a municipal corporation, into a sewer, vested in the respondents as the sanitary authority, and thence flowed into the river Thames:—

Held, that as regards the sewage which came from the respondents premises they had "caused or suffered" the sewage to flow into the Thames within the meaning of s. 94 of the Thames Conservancy Act, 1894, but that as regards the sewage coming from the premises of private persons the respondents had not done so.

Reg. v. *Staines Local Board*, (1889) 60 L. T. 261, followed.

CASE stated by justices for the borough of Gravesend.

The material paragraphs of the case were as follows:—

3. An information was laid on October 23, 1908, as follows:

The information of George Percy Middleton, of the Thames Conservancy Office, Victoria Embankment, in the city of London, on behalf of the Conservators of the River Thames, who states that the mayor, aldermen, and councillors of the borough of Gravesend, in the county of Kent, on the 20th day of January, in the year of our Lord 1908, were duly served with notice in writing dated the 15th day of January, 1908, under the hand of Robert Philipson, the secretary of the said Conservators of the River Thames, given by the said Conservators of

the River Thames in pursuance of the Thames Conservancy Act, 1894, s. 94 (1), to discontinue within fourteen weeks from the date of the service of the said notice the flow or passage of sewage or any other offensive or injurious matter, whether solid or fluid, into the river Thames from the sewers, drains, pipes, or channels belonging to the said mayor, aldermen, and councillors of the borough of Gravesend, and situate in the said borough, and particularly from the main sewage outfall drain on the lower side of the town pier, and a drain discharging into the said river at a point opposite the Sailors' Home, both in the said borough, and that the said mayor, aldermen, and councillors of the borough of Gravesend did not within the time allowed by the said notice discontinue the flow or passage of the sewage or other offensive or injurious matter to which the said notice referred, but unlawfully failed to do so, and after the time so allowed as aforesaid—to wit, on the 12th day of September, 1908—had not discontinued the same and still unlawfully failed to do so, and suffered sewage or other offensive and injurious matter to which the said notice referred to pass into the said river Thames, in the borough of Gravesend aforesaid, contrary to the provisions of s. 94 of the Thames Conservancy Act, 1894.

4. The notice was served on January 20, 1908, on the town clerk of the borough as representing the respondents.

(1) Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), s. 94: "Whenever any sewage or matter aforesaid is caused or suffered to flow or pass into the Thames or into any tributary then and in every such case even though such sewage or matter aforesaid had been lawfully so caused or suffered to flow or pass before the passing of this Act the conservators shall give notice in writing to the person causing or suffering the same so to flow or pass requiring him within a time to be specified in such notice but not being less than three months to discontinue such flow or passage.

"(2.) Provided that the conservators may if they think fit at any time and from time to time extend the time specified in such notice by another notice in writing.

"(4.) Any person to whom any notice is under this section given by the conservators shall notwithstanding anything in any other Act within the time allowed by such notice subject to any extension of such time as in this section provided discontinue the flow or passage of the sewage or matter to which the notice refers and in default of so doing shall be guilty of a misdemeanour and be liable on summary conviction thereof or on conviction thereof on indictment to a penalty not exceeding 100*l.* and to a daily penalty not exceeding 50*l.*"

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5. No evidence was offered as to the alleged drain discharging opposite the Sailors' Home, and it therefore is not further alluded to.

6. With regard to the drain or sewer which is described in the information and summons as the main sewage outfall drain (hereinafter called "the sewer" for reasons appearing in par. 15), and which discharges into the river at a point on the lower side of the town pier, it was proved in evidence that two inspectors of the appellants' purification department kept observation over the discharge into the river at the outfall of the sewer on November 9, 1907. They found the discharge very offensive, giving off an objectionable odour, and took a sample thereof, which was subsequently submitted to the examination and analysis of Professor Charles Edward Groves, F.R.S., F.C.S., London, Paris, and Berlin, &c., who pronounced the same to be an exceedingly bad sample of sewage effluent.

7. On September 12, 1908, that is to say, some months after the expiration of the fourteen weeks referred to in the notice, the two inspectors of the appellants again attended at the outfall of the sewer into the river and kept observation over the discharge therefrom.

8. They found the discharge on this occasion very offensive with an objectionable odour, and took two samples of such discharge, which were also submitted to the examination and analysis of Professor Groves, who pronounced one to be a bad and the other an excessively bad sample of sewage effluent.

10. Upon the evidence the justices were satisfied and they so found that sewage did pass or flow into the river from the outfall of the sewer prior to the date when the notice was given and continued so to do after the expiration of the time allowed by the notice.

11. The discharges, sewage effluent, and sewage referred to in pars. 6 to 10 all form part of the sewage referred to in pars. 15 to 20 and 22.

12. No evidence was offered that sewage or other offensive or injurious matter flowed or passed by the sewer into the river other than the sewage from the houses, buildings, and properties of owners and occupiers referred to in pars. 15 to 20 and 22.

13. The borough of Gravesend was incorporated by charters of the sixteenth and seventeenth centuries, including the market. The name of the municipal corporation is by the Municipal Corporations Act, 1882, s. 8, "The mayor, aldermen, and burgesses of the borough of Gravesend."

14. Prior to and until the Acts hereinafter in this paragraph mentioned the sewers and public drains of the district (which district comprises the lands, streets, buildings, and premises in this special case mentioned) were vested in an entirely separate body called Gravesend Improvement Commissioners, but by the provisional order confirmed by the Act of July 16, 1874 (37 & 38 Vict. c. lxxix.) it is recited that under the provisions of s. 4 of the Public Health Act, 1872, the borough became from the date thereof an urban sanitary district, and the mayor, aldermen, and burgesses acting by the council became from the same date the urban sanitary authority for such district, and the sewers and public drains of the district, including the sewer hereinafter particularly referred to in par. 15, have since been vested in the respondents as such urban sanitary authority.

15. The drainage generally in Gravesend is by cesspools, but 100 years or more ago a storm water surface drain was constructed to carry the rain or surface water down or under High Street (with catchpits at intervals to catch storm-water) into the Thames, and into that drain and thence into the Thames the owners and occupiers of houses adjoining the street and its side courts, yards, and alleys drained the sewage from such houses. That drain thus became a sewer within the modern definition in s. 4 of the Public Health Act, 1875, and is hereinafter referred to simply as the sewer. It is not known precisely how many houses drain into it, but a witness called by the appellants estimated the number at quite 200 as a round figure.

16. Evidence was given as to connections with houses in Swan Yard, Bull Yard, Horn Yard, and Hole in the Wall Alley, but the justices found that the work spoken to as to this was only the opening for cleaning and repair of ancient drains.

17. In 1881 the respondents as the urban sanitary authority extended the sewer farther out from above the foreshore towards low water mark, but this did not carry any additional

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sewage, and is work authorized by s. 18 of the Public Health Act, 1875.

18. Among the properties so draining as aforesaid into the sewer is the property belonging to the municipal corporation of Gravesend, consisting of the town hall fronting High Street, and under or in the rear of it the police station, municipal offices, and market hall. The market is very ancient, a Royal grant of it dating as far back as 1268.

19. On the town hall property the respondents as a municipal corporation in 1893 caused new police cells to be made under or in the rear of the town hall, with two water-closets to the cells and police parade room, and in 1895 new municipal offices in the rear of the town hall, with a new water-closet thereto, and between 1897 and 1899, on the erection of the new market hall, two new water-closets therein as public conveniences for women. All these new erections were and still are drained into a catch or inspection pit on the town hall property and thence into the ancient connection drain in the same property through which the sewage passed and still passes into the sewer and thence flows or passes into the river at the outfall.

20. Except the new works mentioned in par. 16, the whole of the drainage into the sewer mentioned in pars. 15 to 19 has been carried on for more than twenty years before the information laid and for more than twenty years before service of the notice mentioned in the information and for more than twenty years before the municipal corporation became the urban sanitary authority for the borough of Gravesend, and continued so to flow at the times mentioned in the information.

22. High Street, Gravesend, is a street 320 yards in length, running at right angles to the river Thames, and slopes down to the river, and the houses in that street and its side courts and alleys, including the town hall and municipal buildings and premises hereinbefore referred to (and which town hall and municipal buildings are distant from 197 to 217 yards from the river), are, the justices found so far as it is matter of fact, and decided so far as it is matter of law, lands on the banks of the river Thames, and the right to drain into the sewer is prescriptive as to those having so done for twenty years and statutory by s. 21

of the Public Health Act, 1875, and neither these prescriptive or statutory rights are expressly referred to in s. 94 of the present Thames Conservancy Act, 1894. On behalf of the appellants it was (inter alia) contended that any rights which persons or corporate bodies (including the respondents) possessed at the time the Thames Conservancy Act, 1894, was passed were from and after the passing of the said Act expressly made subject to the restrictions imposed by the section, but the justices did not adopt this contention. However this may be, they held that the point does not affect the decisions referred to (post, par. 23) that the defendants do not cause or suffer what they cannot prevent.

23. Upon the facts and under the circumstances hereinbefore referred to the justices decided that a twenty years' drainage as to prescriptive rights and s. 21 of the Public Health Act, 1875, as to matters within twenty years give the owners and occupiers of premises the right to drain into the sewer, and that this right is not affected by the respondents as a municipal corporation becoming or being also the urban sanitary authority, and that the respondents as the urban sanitary authority cannot prevent such drainage until they actually provide an alternative system as effectual, and that they do not "cause or suffer" what they cannot prevent, the remedy for such non-provision being by civil proceeding, whereas the present is a criminal prosecution under s. 94 of the Thames Conservancy Act, 1894: *Reg.* v. *Staines Local Board* (1); *Harrington* v. *Derby Corporation* (2); *Glossop* v. *Heston and Isleworth Local Board* (3); *Attorney-General* v. *Dorking Guardians* (4); *Brown* v. *Dunstable Corporation.* (5)

24. The question of law for the opinion of the Court is whether upon the facts and under the circumstances aforesaid the justices came to a correct determination and decision in point of law, and, if not, what should be done in the premises.

Bankes, K.C., and *C. B. Marriott*, for the appellants. On the facts found by the justices, the respondents should have been

(1) 60 L. T. 261.
(2) [1905] 1 Ch. 205.
(3) (1879) 12 Ch. D. 102.
(4) (1882) 20 Ch. D. 595.
(5) [1899] 2 Ch. 378.

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convicted both in respect of the sewage which enters the sewer from the private houses and also in respect of the sewage coming from the respondents' own buildings. With regard to the former it will be said that the decision in *Reg.* v. *Staines Local Board* (1) is an authority for saying that the respondents have not "caused or suffered" the sewage from the private houses to enter the Thames. That case was, however, decided on s. 64 of the Thames Navigation Act, 1866, the language of which is different from and not so wide as that of s. 94 of the Thames Conservancy Act, 1894. With regard to the sewage coming from the respondents' own buildings the case is stronger, for, whatever rights the respondents may have possessed before the passing of the Act of 1894, s. 94 provides in terms that even though the sewage had been lawfully caused or suffered to flow into the river before the passing of the Act, it shall be an offence to cause or suffer it to do so after the Act comes into force. On the facts stated in the case it cannot be contended that the respondents have not suffered or caused the sewage from their own buildings to flow into the river. [*Harrington* v. *Derby Corporation* (2) and *Brown* v. *Dunstable Corporation* (3) were referred to.]

Macmorran, *K.C.*, and *Waddy*, for the respondents. In the case of sewage entering the sewer from private houses it is clear that the respondents have not "caused or suffered" it to pass into the river. The respondents could not prevent the occupants of the houses from connecting their drains with the sewer; they had either a prescriptive right or a statutory right under s. 21 of the Public Health Act, 1875, to do so. On this point the case is indistinguishable from and is governed by *Reg.* v. *Staines Local Board.* (1) With regard to the sewage which passes from the municipal buildings there is no distinction in principle between the position of the respondents and that of an owner of private property. The respondents are the owners of the municipal buildings in their capacity of a municipal corporation, and for this purpose it can make no difference to their legal rights and duties in connection with the disposal of the sewage from those

(1) 60 L. T. 261. (2) [1905] 1 Ch. 205.
(3) [1899] 2 Ch. 378.

buildings that the sewer into which it passes happens to be vested in them as the sanitary authority. If, as is contended, the owner of private property who lawfully connects his drains with a public sewer commits no offence under s. 94, although the result of his doing so is that sewage passes into the river, then the respondents, by doing what they have done, have equally committed no offence.

LORD ALVERSTONE C.J. In my opinion the decision of the justices was right with respect to so much of the case as deals with the question of sewage passing into the Thames as a result of the connection of the drains of private premises with the sewer. On this point the case is covered by authority, the decision in *Reg.* v. *Staines Local Board.* (1) I am bound to say that I have always felt some difficulty in understanding how it can be said that, if there is a duty on a local authority to dispose of the sewage within their district, and the local authority, in disposing of it, sends it through a sewer into a river, the local authority do not cause or suffer the sewage to go into the river; but, be that as it may, there is the decision in *Reg.* v. *Staines Local Board* (1), upon which we ought to act in this case. It was indeed contended on behalf of the appellants that the language of s. 94, "even though such sewage or matter aforesaid has been lawfully so caused or suffered to flow," made the Act of 1894 more stringent in this respect than the Act under which *Reg.* v. *Staines Local Board* (1) was decided, but it was not seriously contended that, by reason of the owners of private premises having connected their drains with this sewer, the respondents had suffered or caused sewage to flow into the river. Therefore with regard to that part of the case the decision of the justices cannot be interfered with, though it may be that in such cases there is a remedy of another character open to the appellants, by means of an application to the Local Government Board or by mandamus or injunction.

The case, however, stands on a different footing with regard to the finding in pars. 18 and 19, from which it appears that

(1) 60 L. T. 261.

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the respondents themselves have permitted their sewage from the municipal buildings to pass by means of a drain into the sewer and thence into the river. It seems to me that if s. 94 is to have any effect at all, it must apply to the case of a person who has permitted sewage to enter a conduit which he knows will carry it into the river, and, a fortiori, when that conduit is the property of the person who is permitting the sewage to enter it. It may be, as was suggested, that there is a distinction between the capacity in which the respondents own the sewer and that in which they own the municipal buildings, but still, in my opinion, s. 94 is intended to enable the conservators to give the notice referred to in the section to the person who is causing sewage to flow into the Thames; and it is found as a fact here that in and since 1893 new erections have been made on the town hall property, all of which are drained into a drain on the property through which the sewage passes into the sewer and thence flows into the river. If the argument of the respondents is sound, that s. 94 does not apply either to a municipal corporation or to a private owner, or, as was contended before the justices, to the owner of property on the banks of the river, it is a little difficult to see who can be dealt with under the section. In my opinion the section says in clear terms, and means, that a person who does cause sewage to flow into the river is a person who may be served with the notice, and who if he disobeys the notice commits an offence, and I am further of opinion that, having regard to the findings of fact in pars. 18 and 19 of the case, the respondents have caused or suffered sewage to flow from the municipal property into the river.

I am anxious not to allow knowledge obtained outside this case to influence my opinion, and I do not do so, but certainly the general view of s. 94 has been that it was intended to stop persons from causing sewage to flow into channels which ultimately find their way into the Thames, and it seems to me that it would be reducing the section to a nullity if we were to accede to the argument that, because the town hall is owned by the respondents in one capacity and the sewer is vested in them in another, the section has no application to the circumstances of this case. For these reasons I am of opinion that this case must

go back to the justices with a direction to them to convict the respondents in respect of the sewage which passes from the respondents' property into the Thames.

JELF J. I am of the same opinion. I cannot read the first three lines of s. 94 without seeing that it is impossible not to hold that in this case upon the admitted facts the respondents have been doing that which is forbidden. There is a journey of the sewage from the building to the Thames. That journey is divided into two parts; first there is the part of the journey in which the sewage is discharged from the respondents' building into the sewer, and then there is the other part of the journey which deals with the rest of the way along the sewer into the river. In regard to the first part of that journey into the sewer, it cannot be said by the respondents that they are prevented from stopping it, because they actually do it themselves. It seems to me that, a fortiori, they do distinctly cause or suffer the objectionable matter to do that part of the journey at all events. With regard to the other part of the journey, they need not have allowed it to go in there at all, but they have in fact allowed a sewer, not intended for that purpose, to carry this objectionable matter on the rest of the journey into the river. If that is not within the words of the section it really does seem to me that language has lost all its meaning.

SUTTON J. I agree.

Case remitted to justices.

Solicitor for appellants: *W. S. Bunting.*

Solicitors for respondents: *Harrison & Powell, for Brown, Gravesend.*

F. O. R.

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Jan. 17.

DICKESON & CO., APPELLANTS *v.* MAYES, RESPONDENT.

Licensing Acts—Offence—Canteen—Excise Licence—Sale to Civilian—Licensing Acts, 1872 (35 *&* 36 *Vict. c.* 94), *s.* 3; 1902 (2 *Edw.* 7, *c.* 28), *s.* 23—*Summary Jurisdiction—Case stated by Justices—Notice of Appeal—Sufficiency—Summary Jurisdiction Act*, 1857 (20 *&* 21 *Vict. c.* 43), *s.* 2.

A person who holds a canteen, under the authority of a Secretary of State, and who obtains an excise licence for the sale of beer in the canteen does not commit an offence under s. 3 of the Licensing Act, 1872, if he sells beer in the canteen to a civilian.

Sect. 2 of the Summary Jurisdiction Act, 1857, provides that a party dissatisfied with the determination by justices of an information may apply to the justices to state a case, and such party shall, "after receiving such case, transmit the same to the Court . . . . first giving notice in writing of such appeal, with a copy of the case so stated, to . . . . the respondent":—

Held by Lord Alverstone C.J. and Bray J. (Bucknill J. dissenting), that the appellants, who sent to the respondent a copy of their notice of application to the justices to state a case, and a copy of the case, had complied with the requirements of s. 2 of the Act of 1857, as to giving notice of appeal.

Form of notice of appeal in Short and Mellor's Crown Office Practice, 2nd ed., at p. 628, approved of.

CASE stated by justices for the county of Southampton.

An information was laid by the respondent against the appellants for that they on August 9, 1909, at the parish of Highcliff, in the county of Southampton, did unlawfully sell by retail to one Churchill intoxicating liquor, to wit, beer, which they were not then licensed to sell by retail, contrary to s. 3 of the Licensing Act, 1872.

Upon the hearing of the information the following facts were proved or admitted:—

The appellants were army contractors, of 15, High Street, Aldershot. The respondent was a superintendent of police of Ringwood, Hampshire. Prior to August 9, 1909, the appellants had contracted to supply the canteen of the Royal Engineers in the parish of Highcliff. On August 9, 1909, the appellants held an excise licence to sell beer at the said canteen issued under the authority of the Secretary of State in accordance with s. 23 of the Licensing Act, 1902.

The authority was in the following terms:—"Army canteen. Authority for obtaining excise licence. I certify that Messrs. Richard Dickeson & Company, Limited, of High Street, Aldershot, are authorised to hold the canteen of the Royal Engineers situate in the Royal Engineers' camp in the parish of Highcliff from June 2, 1909, to September 2, 1909, and sell therein beer, cider, and perry. (Signed) H. M. Lawson, Major-General i/c Administration, Aldershot Command."

The excise licence was as follows: "England. Publican's beer retail license. Portsmouth collection. I, the undersigned, duly authorised by the Commissioners hereby grant license to R. Dickeson & Co. Ld. to exercise and carry on the trade or business of a retailer of beer in a house situate at the Royal Engineers' Camp in the parish of Highcliff within the administrative county of Hants, and known by the sign of a canteen, and to sell by retail beer, cider, and perry to be consumed either on or off the premises from June 2 until and including September 2, 1909. And I also hereby grant license to them to deal in and sell tobacco and snuff in the said house during the term above mentioned, they having paid for this license, being an ordinary license, the undermentioned duties, amounting together to the sum of 1*l.* 17*s.* 7*d.*" This licence was signed by a collector of Inland Revenue.

On August 9, 1909, the appellants, by their servant, one Harris, sold beer to a civilian named Churchill at the said canteen. Neither the appellants nor Harris held any licence issued by licensing justices authorizing the said sale.

On behalf of the respondent it was contended that the excise licence issued to the appellants, being granted in respect of a canteen, did not authorize the sale of beer to a civilian, and that the sale of beer to Churchill was therefore a sale by the appellants contrary to s. 3 of the Licensing Act, 1872.

It was contended on behalf of the appellants that the said excise licence was an ordinary beer retailer's licence, and that the word "canteen" in the licence was merely descriptive of the place at which the sale of beer was authorized by the licence, and that upon the facts above stated the appellants had not committed any offence against the said section.

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The justices were of opinion that the said excise licence did not authorize the sale of beer by the appellants to a civilian, and that the word "canteen" denoted a place to be used for the sale of intoxicating liquors to the military only, and they accordingly convicted the appellants.

The question for the opinion of the Court was whether the justices came to a correct determination and decision in point of law.

On December 3, 1909, the solicitors of the appellants sent to the respondent a letter headed "R. Dickeson & Co. Ld. and Yourself," enclosing a copy of the case and a copy of the appellants' notice of application to the justices to state a case, in which notice the appellants stated that they were dissatisfied and aggrieved with the determination and conviction of the justices and desired to question the same as being erroneous in point of law.

Douglas Hogg, for the respondent. There is a preliminary objection to the hearing of this case. The appellants have not complied with s. 2 of the Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), which provides that "the appellant shall . . . ., after receiving such case, transmit the same to the Court . . . ., first giving notice in writing of such appeal, with a copy of the case . . . . to . . . . the respondent." The appellants have not given to the respondent notice in writing of their appeal. They have merely served him with a copy of the case, and it was held in *Rust* v. *Churchwardens of St. Botolph* (1) that that is not a sufficient compliance with the statute, because, by so doing, the appellants give no indication that they intend to proceed with the appeal.

Travers Humphreys, for the appellants. The section does not require the notice of appeal to be in any particular form. The appellants by sending the case and a copy of the notice of their application to the justices to state a case, which states in terms that the appellants are dissatisfied with the decision and desire to question the same as being erroneous in law, have done that which is equivalent to giving notice of appeal.

(1) (1906) 94 L. T. 575.

Rust v. *Churchwardens of St. Botolph* (1) is distinguishable because, there, only a copy of the case was sent. There is a suggested form of notice of appeal given in Short and Mellor's Crown Office Practice, 2nd ed. at p. 628, and the appellants by sending those two documents have given the respondent exactly the same information as is contained in that form.

[LORD ALVERSTONE C.J. referred to *Morgan* v. *Edwards*. (2)]

Douglas Hogg in reply. The sending of the notice of application to the justices to state a case does not carry the matter any further, for the point is that after getting the case and seeing its contents an appellant may decide to abandon the appeal. This case cannot be distinguished from *Rust* v. *Churchwardens of St. Botolph*. (1)

LORD ALVERSTONE C.J. In my opinion we ought not to give effect to this preliminary objection. It is true that there is no power to hear an appeal by way of case stated by justices unless the provisions of s. 2 of the Summary Jurisdiction Act, 1857, have been complied with, but this Court has always expressed the opinion that, unless it is satisfied that the requirements of the section have not been fulfilled, the Court will entertain the appeal. In this case the appellants' solicitors wrote to the respondent, enclosing a copy of the notice of application to the justices to state a case, and a copy of the case itself. Having regard to the contents of the notice of application to the justices, we are in my opinion at liberty to hold that, taking the two documents together, that which the appellants have done is equivalent to giving the respondent notice of the appeal. This case is not, in my opinion, quite the same as *Rust* v. *Churchwardens of St. Botolph* (1), for in that case there was nothing to indicate that the appellant was intending to proceed with the appeal.

This view is in accordance with the opinion expressed by this Court in *Provincial Motor Cab Co.* v. *Dunning* (3).

BUCKNILL J. I regret that I am unable to agree. In my opinion, if we hold that the appellants have in this case complied

(1) 94 L. T. 575. (2) (1860) 5 H. & N. 415.
(3) (1909) 73 J. P. 387.

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with the requirements of s. 2 of the Summary Jurisdiction Act, 1857, we shall be whittling down the previous decisions on this point. The whole matter is statutory, and the section requires that the appellant shall send a copy of the case to the respondent, together with a notice in writing of the appeal; that is to say, he must give the respondent notice that he intends to go on with the appeal. I cannot see that the appellants in this case merely by sending to the respondent a copy of their notice of appeal to the justices to state a case, and a copy of the case, have in any way informed the respondent that, having got the case, they intend to go on with the appeal. I therefore think that the preliminary objection to the hearing of this appeal is a good one.

BRAY J. I agree with the Lord Chief Justice. The cases shew that it is not sufficient to send only a copy of the case; but here the appellants have done more than that. They have done something which the Act does not require them to do, except as a means of giving the notice of appeal. They sent to the respondent a copy of the notice of their application to the justices to state a case, and that notice says in terms that the appellants are dissatisfied with the decision of the justices and desire to question it. In my opinion that is a sufficient notice of appeal to satisfy the requirements of the statute. The form of notice given in Short and Mellor's Crown Office Practice sets out in terms almost exactly the same matters as are contained in the two documents sent by the appellants. That form is, of course, not a statutory form, but in my opinion it indicates quite accurately what should be stated in the notice of appeal in order that it may sufficiently fulfil the requirements of the statute.

Travers Humphreys, for the appellants. Before the Licensing Act, 1902, a person holding a canteen under the authority of a Secretary of State was required to have a justice's licence before he could obtain an excise licence for the sale of intoxicating liquor; but under s. 23 of the Act of 1902 a person holding a canteen under the authority of a Secretary of State can obtain an excise licence to sell intoxicating liquor without having to

obtain a justice's licence or certificate. The appellants' excise licence was issued under the Beerhouse Act, 1830, and it is the only retailer's beer licence which can be issued. There is nothing in that licence to prevent the appellants from selling beer to civilians; and, therefore, the appellants have not committed any offence under s. 3 of the Licensing Act, 1872.

[He was stopped.]

Douglas Hogg, for the respondent. A canteen is a place where drink is sold to soldiers. The appellants' licence only permits them to sell in a canteen, and if the appellants sell beer to civilians the place loses its character of a canteen. If the appellants' contention is correct, it follows that none of the provisions of the Act of 1872 as to closing time or as to sales during prohibited hours apply to canteens. It cannot have been intended that s. 23 of the Act of 1902 should have that effect.

LORD ALVERSTONE C.J. I am of opinion that this appeal must be allowed. The question is whether the appellants, who keep a regimental canteen and hold an excise licence for the sale of beer in the canteen, have committed an offence under s. 3 of the Licensing Act, 1872, by selling beer in the canteen to a civilian. Two conditions must exist in order that the sale of intoxicating liquor may not be a contravention of the law. There must be a person authorized to sell, and a place in which that person is authorized to sell. The appellants were undoubtedly persons who were authorized to sell, because they were persons holding a canteen under the authority of the Secretary of State, and, as such, were entitled to obtain, and had obtained, an excise licence for the sale of beer. As regards the place, the appellants were authorized by their excise licence to sell the beer in the canteen in question. It is said that they were only entitled to sell beer to soldiers. Does that mean only soldiers in uniform, or are the appellants bound to inquire of every person who comes into the canteen in plain clothes if he is a soldier? In my opinion the holder of a licence for a canteen is not bound to make such inquiry. There is nothing in the Licensing Acts to prevent a person who holds an excise licence

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for the sale of beer in a regimental canteen from selling beer in that canteen to civilians.

BUCKNILL and BRAY JJ. concurred.

Appeal allowed.

Solicitors for appellants: *Eve & Clinton, Aldershot.*

Solicitor for respondent: *E. Ewart White, for Tattersall & Son, Bournemouth.*

F. O. R.

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Dec. 20.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* ROWLAND.

Criminal Law—Receiving Stolen Goods—Goods "found in his possession" —Prevention of Crime Act, 1871 (34 & 35 *Vict. c.* 112), *s.* 19—*Evidence — Prisoner called as Witness on behalf of Fellow Prisoner — Cross-examination—Criminal Evidence Act*, 1898 (61 & 62 *Vict. c.* 36), *s.* 1 (*e*).

On the trial of a prisoner for receiving goods knowing them to be stolen it was proved that he pawned the goods with a pawnbroker on the day preceding that of his arrest:—

Held, that the goods were "found in his possession" within the meaning of s. 19 of the Prevention of Crime Act, 1871, and that for the purpose of proving guilty knowledge evidence might be given that he had been previously convicted of an offence involving dishonesty.

Reg. v. *Drage*, (1878) 14 Cox, C. C. 85, and *Reg.* v. *Carter*, (1884) 12 Q. B. D. 522, not followed.

Where two prisoners are tried for an offence and one gives evidence on behalf of the other, the prisoner so giving evidence may, under s. 1 (*e*) of the Criminal Evidence Act, 1898, be asked questions in cross-examination tending to criminate him as to the offence charged, although he has given no evidence in support of his own defence.

APPEAL to the Court of Criminal Appeal against conviction.

The appellant was indicted at the Middlesex Sessions together with one Bessant for having on October 12, 1909, broken and entered a dwelling-house at Fulham and stolen certain articles therein, and also for receiving the articles knowing them to be stolen. The evidence went to shew that the house was broken into and the goods in question were stolen on October 12, and that on October 14 the appellant pledged the goods with various

pawnbrokers. On October 15 the appellant was taken into custody, and at that time none of the goods were in his possession. At the trial the appellant declined to give evidence on his own behalf, but at Bessant's request he went into the witness-box and gave evidence with the object of establishing Bessant's innocence. He did not when in the witness-box make any statements tending to exculpate himself. Counsel for the prosecution, however, cross-examined him as to the circumstances under which he obtained possession of the goods which he pawned, with the view of shewing that he was guilty of the offence charged. Evidence was also tendered by the prosecution, and admitted by the judge, that the appellant had been convicted on August 4, 1906, of attempting to obtain money by fraud. The evidence was admitted under s. 19 of the Prevention of Crime Act, 1871 (1), as tending to shew a guilty knowledge on the part of the appellant that the goods in question had been stolen. The appellant was found guilty of receiving.

C. L. Attenborough, for the appellant. The judge was wrong in admitting evidence as to the appellant's previous conviction. The section of the Prevention of Crime Act, 1871 (s. 19), under which it was admitted has no application, for the stolen property was not "found in his possession." The meaning of those words

(1) By s. 19 of the Prevention of Crime Act, 1871, "Where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, evidence may be given at any stage of the proceedings that there was found in the possession of such person other property stolen within the preceding period of twelve months, and such evidence may be taken into consideration for the purpose of proving that such person knew the property to be stolen which forms the subject of the proceedings taken against him.

"Where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, and evidence has been given that the stolen property has been found in his possession, then if such person has within five years immediately preceding been convicted of any offence involving fraud or dishonesty, evidence of such previous conviction may be given at any stage of the proceedings, and may be taken into consideration for the purpose of proving that the person accused knew the property which was proved to be in his possession to have been stolen."

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has been the subject of more than one decision. In *Reg.* v. *Drage* (1) the prisoner was indicted for receiving goods knowing them to be stolen. Certain of the goods in question were found in his possession by the police. It was proposed for the purpose of proving guilty knowledge to give in evidence proof that within the preceding twelve months certain other goods had been stolen and had been sold by the prisoner for half their value. Bramwell L.J. ruled that the evidence was inadmissible and that it must be proved that the subject of the earlier larceny was "found in the possession" of the prisoner at the time of finding the stolen property which was the subject of the indictment. The same question came before the Court for Crown Cases Reserved in *Reg.* v. *Carter*. (2) The prisoner was indicted for stealing a mare on May 20, 1883, and also for receiving it. Evidence was admitted that the prisoner on May 9, 1883, had sold another mare which had been stolen a few months before. The Court held, following *Reg.* v. *Drage* (1), that the latter mare was not found in his possession, and that the evidence was wrongly admitted. They accordingly quashed the conviction. Those cases shew that to bring a case within the section it is not enough to prove that the subject of the earlier larceny has been traced to the prisoner's possession if that possession has been parted with however recently. It is true that those cases arose under the first paragraph of s. 19, whereas the present case arises under the second. But the object of the enactments in the two paragraphs being the same, namely, to facilitate proof of guilty knowledge that the goods were stolen, no possible reason can be suggested why a different meaning should be given to the same words "found in his possession" in the two paragraphs, and therefore those decisions must be treated as binding authorities upon the meaning of the words in the second paragraph. Here it is not disputed that the prisoner, having pawned the goods on the preceding day, had no possession of them, physical or legal, at the time of his apprehension. Secondly, the judge was wrong in allowing the prosecuting counsel to cross-examine the appellant for the purpose of shewing that he was guilty. It is admitted that he was a

(1) 14 Cox, C. C. 85. (2) 12 Q. B. D. 522.

competent witness, but the power to cross-examine a prisoner with the object of proving his own guilt, which is given by s. 1, sub-s. (*e*), of the Criminal Evidence Act, 1898, was intended to be exercised only in cases in which he has given evidence on his own behalf, and not to apply to cases where he has confined his evidence to supporting the defence of a co-defendant.

J. P. Grain, for the Crown, was not called on.

The judgment of the COURT (Lord Alverstone C.J., Darling and Phillimore JJ.) was delivered by

LORD ALVERSTONE C.J. In this case two objections have been taken to the conviction. It is said that evidence of the previous conviction in August, 1906, was improperly received under s. 19 of the Prevention of Crime Act, 1871, because the condition of the goods having been "found in his possession" was not satisfied. Here the goods were not in fact found by the police in the prisoner's possession when they arrested him on the charge of receiving them, because he had already pawned them on the preceding day; and it is said that on these facts the section does not apply. I cannot think that those words "found in his possession" mean that the stolen goods must be actually found in the prisoner's possession at the time of his arrest. It seems to me that it is enough if there is evidence that the stolen goods had been in the receiver's possession shortly after they were stolen. Secondly, it is contended that the prisoner was wrongly cross-examined as to his own share in the transaction. It was said that, as he only gave evidence in chief in support of Bessant's case and did not give any evidence in support of his own, he could only be cross-examined for the purpose of establishing Bessant's guilt. That turns upon the language of s. 1, sub-s. (*e*), of the Criminal Evidence Act, 1898, which provides that "A person charged and being a witness in pursuance of this Act may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged." Here the appellant was "a person charged," and he was also "a witness in pursuance of this Act," for before the Act he could not have given evidence in Bessant's favour. Therefore he comes directly within the words

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of the sub-section. Mr. Attenborough asks us to read the words as if they were "being a witness on his own behalf in pursuance of this Act," and that we cannot do. The appeal must be dismissed.

Appeal dismissed.

Solicitor for appellant: *Registrar of the Court of Criminal Appeal.*

Solicitor for the Crown: *Director of Public Prosecutions.*

J. F. C.

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Dec. 16.

GOLDING *v.* SMITH.

County Court—Costs—Power of County Court Judge to award fixed Sum for Costs before Taxation—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *ss.* 113, 118.

A county court judge has no power under s. 113 of the County Courts Act, 1888, to award a party a fixed sum for costs which have not been taxed under s. 118.

APPEAL from a decision of the judge of the Clerkenwell County Court.

The action was brought in the county court to recover 96*l.* 11*s.* 6*d.* for damages for breach of an agreement to repair and keep and leave in repair a house.

The defendant paid into Court the sum of 19*l.* in respect of the claim and 1*l.* 16*s.* 2*d.* in respect of costs, with a denial of liability.

The county court judge gave judgment for the plaintiff for 8*l.* beyond the amount paid into Court and awarded him 10*l.* 10*s.* costs for solicitor and witnesses in addition to the Court fees.

The plaintiff appealed from so much of the judgment as limited the costs of the plaintiff for solicitor and witnesses to 10*l.* 10*s.* and Court fees on the grounds (inter alia) that the judgment was erroneous in point of law and that the county court judge was acting without jurisdiction in limiting the amount of costs payable to the plaintiff in manner appearing from the judgment.

By s. 113 of the County Courts Act, 1888, "All the costs of any action or matter in the Court, not herein otherwise provided

for, shall be paid by or apportioned between the parties in such manner as the Court shall think just, and in default of any special direction shall abide the event of the action or matter, and execution may issue for the recovery of any such costs in like manner as for any debt adjudged in the said Court."

Sect. 118: "All costs and charges between party and party shall be taxed by the registrar of the Court in which such costs and charges were incurred, but his taxation may be reviewed by the judge on the application of either party, and no costs or charges shall be allowed on such taxation which are not sanctioned by the scale then in force. . . . ."

Cox-Sinclair, for the plaintiff. The county court judge had no jurisdiction before taxation to award the plaintiff a lump sum by way of costs. Sect. 118 of the County Courts Act, 1888, provides that all costs "shall be" taxed. Sects. 113 and 118 ought to be read together, and taxation under s. 118 is a condition precedent to any apportionment by the judge under s. 113. Order LIII., r. 1, of the County Court Rules, 1903, also provides that "all costs shall be taxed by the registrar." In *Beadle* v. "*S. Nicholas*" (1) it was held by the Court of Appeal under sub-s. 7 of Sched. II. of the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), which provides that "the costs . . . . shall not exceed the limit prescribed by rules of Court and shall be taxed in manner prescribed by those rules," that a county court judge was not entitled to award a lump sum for costs before taxation. The decision in that case is an authority in favour of the plaintiff.

C. Doughty, for the defendant. The decision in *Beadle* v. "*S. Nicholas*" (1) does not apply. The language of sub-s. 7 of Sched. II. to the Workmen's Compensation Act, 1906, is different from that of ss. 113 and 118 of the County Courts Act, 1888. Sect. 113 of the County Courts Act, 1888, gives the judge jurisdiction to make any order as to costs he thinks proper, provided he does not order an amount which would exceed that which could be allowed upon taxation. In the present case the county court judge exercised his discretion, and his decision,

(1) [1909] W. N. 227.

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therefore, is not subject to appeal. [*Wright* v. *Bull* (1), *Aston Tube Works, Ld.* v. *Dumbell* (2), and *Everall* v. *Brown* (3) were also referred to.]

DARLING J. I am of opinion that this appeal must be allowed. Sect. 113 of the County Courts Act, 1888, gives a county court judge power to order that the costs shall be paid by or apportioned between the parties in such manner as he shall think just. In my judgment the "costs" referred to in that section mean costs which have been taxed, because s. 118 says "all costs and charges between party and party shall be taxed by the registrar." If the county court judge had made an order that if the plaintiff's costs when taxed amounted to more than 10*l.* the defendant should pay to the plaintiff only 10*l.*, I think he would have been perfectly right. The costs may yet be taxed, and if when that is done the plaintiff's costs amount to more than 10*l.* the county court judge will, if he thinks proper, be at liberty to apply s. 113 and allow the plaintiff 10*l.* only for costs. In my judgment we cannot hold that the order as made was right, because the effect would be to deprive a party of the right which he has under s. 118 to have the costs taxed. Further, an order in the form of that made by the county court judge would equally apply in a case where a party's costs on taxation amounted to a less sum than that which the county court judge ordered to be paid by the other party. The appeal must be allowed and the case must go back to the county court judge to make a proper order.

PICKFORD J. I agree that the order of the county court judge cannot be supported. In my judgment the effect of the provision contained in sub-s. 7 of Sched. II. of the Workmen's Compensation Act, 1906, is in substance the same as the combined effect of ss. 113 and 118 of the County Courts Act, 1888. The only provision in sub-s. 7 of Sched. II. to the Workmen's Compensation Act, 1906, which is not in substance contained in these two sections is that which directs that the costs "shall not

(1) [1900] 2 Q. B. 124. (2) [1904] 1 K. B. 535.
(3) [1905] 2 K. B. 196.

exceed the limit prescribed by rules of Court." I do not think that the decision in *Beadle* v. "*S. Nicholas*" (1) was based upon the meaning of those words, but upon that of the subsequent words "shall be taxed in manner prescribed by those rules." On those words the Court of Appeal held that there was no power to make an order for a lump sum for costs. I am of opinion that the principle of that decision applies to ss. 113 and 118 of the County Courts Act, 1888, which must be read together, and, therefore, the decision governs the present case. I prefer not to express any opinion as to whether the judge can, after taxation, direct that a fixed sum shall be allowed.

Appeal allowed.

Solicitors for plaintiff: *R. Gramshaw & Son.*
Solicitors for defendant: *Mills, Lockyer & Mills.*

J. E. A.

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Dec. 16.

Partnership—Validity of Notice of Dissolution—Partnership determinable "by mutual arrangement only"—Partnership Act, 1890 (53 & 54 *Vict. c.* 39), *ss.* 26, 32.

By s. 26, sub-s. 1, of the Partnership Act, 1890, where "no fixed term" has been agreed upon for the duration of the partnership any partner may determine it at any time by notice.

By s. 32, "subject to any agreement" between the partners, a partnership "for an undefined time" may be dissolved by notice.

An agreement of partnership was entered into between two persons by which it was provided that the partnership should be terminated "by mutual arrangement only." One partner gave notice of his intention to determine the partnership:—

Held, that although the duration of the partnership was for "no fixed term" within the meaning of s. 26, sub-s. 1, it was also for an "undefined time" within the meaning of s. 32, and that, as by the qualification contained in that section it could only be determined by notice "subject to any agreement between the parties," effect must be given to that

(1) [1909] W. N. 227.

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qualification as governing s. 26, sub-s. 1, and therefore the partnership could only be determined by mutual arrangement as provided by the partnership agreement.

Appeal from a judgment of the judge of the Sussex County Court sitting at Brighton.

By an agreement in writing dated August 14, 1907, the plaintiff Moss and the defendant Elphick became partners in a tobacconist's business carried on at 68, Queen's Road, Brighton. The clauses contained in the agreement were as follows:

"(1.) The said Alick Milton Elphick agrees to accept and the said Sydney Moss agrees to pay the sum of two hundred and fifty pounds (250*l.*) as a sleeping partner in the tobacconist's business . . . . situated at 68 Queen's Road Brighton in the county of Sussex.

"(2.) The said Alick Milton Elphick to work the business at a weekly salary of two pounds (2*l.*) to be taken from the shop receipts.

"(3.) All expenses in connection with the premises such as rent, rates and taxes, and electric light charges licences and all insurance charges to be paid for out of receipts and on the thirteenth day of June in each year following stock to be taken and a balance struck and the nett profits on the year's trading to be equally divided between the said Alick Milton Elphick and Sydney Moss.

"(4.) This agreement shall be terminated by mutual arrangement only."

On March 2, 1909, the plaintiff gave the defendant a fortnight's notice in writing of his intention to terminate the partnership. The defendant contended that the notice was inoperative upon the ground that by clause 4 of the agreement the partnership could only be determined by mutual consent.

The plaintiff thereupon commenced the action in the county court, claiming (inter alia) a receiver and manager of the partnership business and that the affairs thereof might be wound up by the Court.

The county court judge gave judgment for the defendant upon the ground that the partnership could only be terminated by the parties by mutual consent.

The plaintiff appealed.

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E. E. Humphrys, for the plaintiff. There was no fixed term for the duration of the partnership, as it was only determinable by mutual consent. The plaintiff was therefore entitled to give notice of his intention to determine the partnership under s. 26, sub-s. 1, of the Partnership Act, 1890 (1): *Baxter* v. *Plenderleath*. (2) In order that a partnership may be for a fixed term the term agreed upon must be clearly expressed in the agreement or deed of partnership. [Lindley on Partnership, 7th ed., p. 142, was also referred to.]

S. P. Low (*H. Harker* with him), for the defendant. It is clear upon the face of the agreement that the intention of the parties was that the partnership should not be capable of being dissolved by one member. In a proper case the Court could at any time decree a dissolution under s. 35 of the Partnership Act, 1890. The effect of s. 26, sub-s. 1, coupled with s. 32, sub-clause (*c*), is that, if there is no event on the happening of which the partnership is to come to an end, it is entered into for "no fixed term" or "for an undefined time," and any partner may determine it by notice. But in the present case there was an event on the happening of which the partnership was to come to an end, namely, if and when both partners consented to a dissolution. Therefore one partner could not determine it by notice.

Humphrys, in reply, referred to Lindley on Partnership, 7th ed., p. 580.

DARLING J. This case presents some difficulty in consequence of the language of ss. 26 and 32 of the Partnership Act, 1890. In my judgment the agreement of partnership entered into

(1) Partnership Act, 1890, s. 26, sub-s. 1: "Where no fixed term has been agreed upon for the duration of the partnership, any partner may determine the partnership at any time on giving notice of his intention so to do to all the other partners."

Sect. 32: "Subject to any agreement between the partners, a partnership is dissolved— . . . .

"(*c* If entered into for an undefined time, by any partner giving notice to the other or others of his intention to dissolve the partnership.

"In the last mentioned case the partnership is dissolved as from the date mentioned in the notice as the date of dissolution, or, if no date is so mentioned, as from the date of the communication of the notice."

(2) (1824) 2 L. J. (O.S.) (Ch.) 119.

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between the plaintiff and defendant is one for a partnership for "no fixed term" within the meaning of s. 26 of the Act. I think that by the words "fixed term" contained in that section it must be understood that the partnership is to continue for so many years or so many months, or that the agreement is to come to an end upon a specified day. The agreement in the present case only fixed the method by which it was to be brought to an end. So far, therefore, I agree with the contention on behalf of the plaintiff, and if the only section dealing with the matter were s. 26 I should be of opinion that the partnership could be determined by the notice in writing. But it is necessary to consider the effect of s. 32 of the Act, and I am of opinion that the partnership was also one for an "undefined time" within the meaning of clause (*c*) of s. 32. Sect. 32, clause (*c*), says that a partnership is dissolved "if entered into for an undefined time, by any partner giving notice to the other or others of his intention to dissolve the partnership." If that were all I should say that the partnership, not being for a "fixed term" and also being for an "undefined time," could be determined by one partner giving notice to the other. Sect. 32, however, enacts that its provisions are to apply "subject to any agreement between the partners." The agreement between the plaintiff and defendant provides that it shall be terminated by mutual arrangement only. That being so, I think that there is an agreement between the partners that the partnership can only be terminated in the way specified, and that consequently by s. 32 it cannot be terminated merely by one of the partners giving notice of his intention to do so. I therefore think that the county court judge came to a right conclusion and that this appeal must be dismissed.

PICKFORD J. I agree. I find it extremely difficult to reconcile the two sections of the Partnership Act, 1890. Sect. 26 is quite unqualified in its terms, whilst s. 32 is qualified by the words "subject to any agreement between the partners" at the beginning of the section. Where there are two sections dealing with the same subject-matter, one section being unqualified and the other containing a qualification, effect must be given to the

section containing the qualification. The appeal must therefore be dismissed.

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Appeal dismissed.

Solicitors for plaintiff: *Peacock & Goddard, for Gaby & Stapylton-Smith, Hastings.*

Solicitors for defendant: *Langham, Son & Douglas, for Savery, Brighton.*

J. E. A.

THE KING *v.* DICKINSON. *Ex parte* DAVIS.

1909 *Dec.* 16.

Criminal Law—Indecent Assault on Female under Sixteen Years of Age—Consent of Prisoner to be dealt with summarily—Right of Appeal from Conviction—Summary Jurisdiction Act, 1879 (42 & 43 *Vict. c.* 49), *s.* 12—*Children Act,* 1908 (8 *Edw.* 7. *c.* 67), *ss.* 33, 128.

If a person, charged before a Court of summary jurisdiction with an indecent assault on a female who in the opinion of the Court is under the age of sixteen years, consents to be dealt with summarily by virtue of the power conferred on Courts of summary jurisdiction by s. 12 of the Summary Jurisdiction Act, 1879, and s. 128 of the Children Act, 1908, he has no right of appeal under s. 33 of the Act of 1908.

RULE nisi obtained at the instance of one David Davis calling upon a metropolitan magistrate and one Miriam Walsh to shew cause why the magistrate should not proceed pursuant to the statutes in that behalf to take the recognizance to be entered into by the applicant Davis on his appeal to the quarter sessions of the peace for the county of London against a conviction by the magistrate whereby the applicant was convicted of an offence under the Offences against the Person Act, 1861.

On November 27, 1909, the applicant was arrested by a constable and charged under s. 52 of the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), with unlawfully and indecently assaulting one Miriam Walsh, a female, aged thirteen years.

The magistrate, having heard the evidence for the prosecution and being satisfied that the girl Walsh was under the age of sixteen, thought it expedient to try the applicant summarily for

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the offence, in pursuance of s. 12 of the Summary Jurisdiction Act, 1879, and s. 128 of the Children Act, 1908.

The charge was accordingly reduced into writing and read to the applicant, and the magistrate addressed to him the question, "Do you desire to be tried by a jury, or do you consent to your case being dealt with summarily?" The magistrate explained to him that he had a right to be tried by a jury if he wished, and that if he were tried summarily he would have no appeal from the decision. The applicant intimated his consent to be tried summarily. He then gave evidence on his own behalf, and several witnesses for his defence were examined, and his solicitor addressed the Court.

Upon the evidence the magistrate found that the applicant was guilty of the offence with which he was charged and sentenced him to three months' imprisonment in the second division.

On December 1, 1909, the applicant served, through his solicitor, a notice of appeal to quarter sessions, and on December 4 the solicitor applied to the magistrate to allow the applicant to enter into a recognizance in accordance with s. 31, sub-s. 3, of the Summary Jurisdiction Act, 1879, and tendered certain persons as sureties.

The magistrate refused the application on the ground that the applicant was not a person authorized within the meaning of s. 31 of the Act of 1879 to appeal from his conviction. The magistrate made an affidavit in which he stated (inter alia) that the ground of his decision was as follows: By s. 128, sub-s. 2, of the Children Act, 1908, it is enacted that "the First Schedule to the Summary Jurisdiction Act, 1879, shall include the offence mentioned in the Second Schedule to this Act, in the same manner as if that schedule formed part of the First Schedule to the Summary Jurisdiction Act, 1879."

The offence of committing an indecent assault on a female person who in the opinion of the Court is under sixteen is consequently one of the offences to which s. 12 of the Summary Jurisdiction Act, 1879, applies.

There is no appeal from a conviction under s. 12 of the Act of 1879, because s. 19 of that Act gives an appeal against a

conviction under "any past or future Act," but not under the Act of 1879 itself, and upon this point the magistrate was governed by the decision in *Reg.* v. *London Justices.* (1)

It was, however, contended on behalf of the applicant that s. 33 of the Children Act, 1908, gave him a right to appeal against his conviction inasmuch as s. 19 and other sections of Part II. of the Act of 1908, by giving a power of arrest and by otherwise providing for special procedure in the case of certain offences set forth in the First Schedule to the Act, brought all those offences, of which indecent assault upon a female is one (see s. 52 of the Offences against the Person Act, 1861 (2)), within the

(1) [1892] 1 Q. B. 664.

(2) Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 52: "Whosoever shall be convicted of any indecent assault upon any female . . . . shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour."

Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 12: "Where a person who is an adult is charged before a Court of summary jurisdiction with any indictable offence specified in the second column of the First Schedule to this Act," the Court may, if they think it expedient to do so, and with the consent of the person charged, deal summarily with the offence and inflict a sentence of imprisonment for any term not exceeding three months, or impose a fine not exceeding twenty pounds.

Sect. 19: "Where, in pursuance of any Act, whether past or future, any person is adjudged by a conviction or order of a Court of summary jurisdiction to be imprisoned without the option of a fine," he may appeal to quarter sessions.

Sect. 49 defines a "child" and "young person" as persons who are respectively under the age of twelve, and between twelve and sixteen.

Children Act, 1908 (8 Edw. 7, c. 67), Part II., s. 19: "Any constable may take into custody, without warrant, any person . . . .

"(*b*) who has committed, or who the constable has reason to believe has committed . . . . any of the offences mentioned in the First Schedule to this Act, if he has reasonable ground for believing that such person will abscond, or if the name and address of such person are unknown to and cannot be ascertained by the constable."

Part II., s. 33: "When in pursuance of this part of this Act, any person is convicted by a Court of summary jurisdiction of an offence . . . . he may appeal against such a conviction . . . . to quarter sessions."

Part VI., s. 128, sub-s. 1: "In the definition of 'child' and 'young person' in the Summary Jurisdiction Act, 1879, 'fourteen years' shall be substituted for 'twelve years.'"

Sub-s. 2: "The First Schedule to the Summary Jurisdiction Act, 1879, shall include the offence mentioned in the Second Schedule to this Act in the same manner as if that

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provisions of s. 33 of the Children Act, 1908, and made a conviction for any of those offences a conviction "in pursuance of this part of this Act" in the words of that section.

The magistrate felt unable to give effect to that view because although the arrest had been "in pursuance of this part of this Act," that was, in his opinion, a mere incident in the case. Had the defendant not been arrested, but proceeded against by the process of the Court (i.e., a summons or a warrant), nothing whatever would have been done "in pursuance of this part of this Act," and the magistrate felt unable to hold that the defendant's right of appeal was affected by the manner in which he was brought before the Court.

Further, in s. 19 and other sections of Part II. of the Children Act, 1908, there are references to "an offence under this part of this Act or any of the offences mentioned in the First Schedule to this Act," whereas in s. 33 "this part of this Act" is alone mentioned, clearly indicating that the right of appeal given was in respect of convictions for cruelty or other offences created by Part II. of the Act of 1908, and not in respect of convictions in pursuance of the Acts mentioned in the First Schedule to that Act.

The magistrate was of opinion that s. 33 of the Children Act, 1908, did not apply to or include the offence dealt with in s. 128, sub-s. 2, and that therefore he had not jurisdiction to accept the recognizance of the applicant.

Clarke Hall, for the magistrate, shewed cause. The decision in *Reg.* v. *London Justices* (1) shews that if a person charged

schedule formed part of the First Schedule to the Summary Jurisdiction Act, 1879:

"Provided that where a Court of summary jurisdiction deals with such an offence summarily under section twelve of that Act the maximum term of imprisonment which the Court may inflict shall be six instead of three months."

FIRST SCHEDULE.

"Any offence . . . . against a child or young person under section . . . . fifty-two" of the Offences against the Person Act, 1861.

SECOND SCHEDULE.

First Column. Adults pleading guilty.	Second Column. Adults consenting.
	Committing an indecent assault upon a person, whether male or female, who in the opinion of the Court is under the age of sixteen years.

(1) [1892] 1 Q. B. 664.

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with an indictable offence mentioned in the First Schedule to the Summary Jurisdiction Act, 1879, consents to be dealt with summarily under s. 12 of the Act and is convicted he has no right of appeal. The offence of committing an indecent assault upon a female is not mentioned in the First Schedule to the Summary Jurisdiction Act, 1879, and therefore the applicant could not have been dealt with summarily by the magistrate before the enactment of s. 128, sub-s. 2, of the Children Act, 1908, which provides in effect that the First Schedule to the Summary Jurisdiction Act, 1879, is to include the offence of committing an indecent assault upon a person who in the opinion of the Court is under sixteen years of age. The result is that the First Schedule to the Summary Jurisdiction Act, 1879, must be read as if that offence were included among the offences mentioned in it. Therefore, when a person charged with committing an indecent assault consents to be dealt with summarily, s. 12 of the Summary Jurisdiction Act, 1879, applies, and the decision in *Reg.* v. *London Justices* (1) shews that he has no right of appeal.

J. A. Hawke, in support of the rule. The applicant has a right of appeal by virtue of s. 33 of the Children Act, 1908. *Reg.* v. *London Justices* (1) does not apply. The decision in that case was that if a person consents to be dealt with summarily under s. 12 of the Summary Jurisdiction Act, 1879, he has no right of appeal under s. 19 of that Act, which gives the right to appeal where a person is convicted under any "past or future" Act, but not where he is convicted under the Act of 1879. In the present case the applicant was convicted under a "future" Act within the meaning of s. 19 of the Act of 1879 because he was convicted under s. 128 of the Children Act, 1908, the effect of which was for the first time to give a magistrate power to deal summarily with the offence of committing an indecent assault and to inflict a maximum term of six months' imprisonment instead of three months', which was the maximum authorized by s. 12 of the Summary Jurisdiction Act, 1879. The applicant has been sentenced to imprisonment without the option of a fine and is therefore within the provisions of s. 19 of the Summary Jurisdiction Act, 1879, which gives a right of appeal to quarter

(1) [1892] 1 Q. B. 664.

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sessions to a person who is convicted under a future Act and is sentenced to imprisonment. That section shews that the present case is within the class in which it was thought desirable to give a right of appeal.

It is true that the right of appeal provided by s. 33 of the Children Act, 1908, is given when in pursuance of "this part of this Act" a person is summarily convicted and that s. 33 is in Part II. of the Act, while s. 128, by virtue of which the summary conviction took place, is in Part VI. But Part II. deals with two classes of offences. It consists of ss. 12 to 38, of which ss. 12 to 18 create a variety of offences. The remainder of Part II. in substance deals with procedure, including provisions as to arrest and evidence. The right of appeal given by s. 33 is not limited to the offences created by Part II. The words of the section are "when . . . . any person . . . . is convicted by a Court of summary jurisdiction of an offence," not "of an offence created by Part II." The words "in pursuance of this part of this Act" were inserted in s. 33 to prevent an appeal from convictions of offences under Part I. and Part. III. of the Act. Those are comparatively small offences which are purely the subject of summary jurisdiction. Where, as in the present case, a person is convicted after being arrested by virtue of the power given in s. 19, and the evidence in the proceedings is subject to the provisions of s. 27, inasmuch as both those sections are in Part II. of the Act, he may fairly be said to be convicted in pursuance of Part II. of the Act. [Sect. 4 of the Summary Jurisdiction Act, 1879, and s. 16 of that Act, which is repealed by the Probation of Offenders Act, 1907 (7 Edw. 7, c. 17); s. 32, sub-s. 1, of the Children Act, 1908; and *Rex* v. *Hanson* (1) were also referred to.]

LORD ALVERSTONE C.J. This case raises a question which is quite worthy of consideration, but in my judgment if we were to uphold the contention on behalf of the applicant we should be departing from the plain meaning of the words of the Children Act, 1908. That contention is that the right of appeal given by s. 33 where a person is convicted summarily in pursuance of

(1) (1821) 4 B. & Al. 519.

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"this part of this Act" (i.e., Part II. of the Act of 1908) applies where a person is convicted summarily of an indecent assault by virtue of the operation of s. 128, which is in Part VI. of the Act. Now until the passing of the Children Act, 1908, if a person consented to be dealt with summarily under the powers conferred upon Courts of summary jurisdiction by s. 12 of the Summary Jurisdiction Act, 1879, he had no right of appeal. On behalf of the applicant it has been pointed out, and I think rightly, that the principal ground of the decision in *Reg.* v. *London Justices* (1) was that the applicant in that case was convicted by virtue of the provisions contained in s. 12 of the Summary Jurisdiction Act, 1879, and that therefore he had no right of appeal under s. 19 of that Act, which gave a right of appeal from convictions by a Court of summary jurisdiction "in pursuance of any Act whether past or future." I am not quite sure that if I had been a member of the Court in *Reg.* v. *London Justices* (1) I should have placed my judgment on quite so narrow a ground. But that is immaterial. It was clear from 1892, when the decision in *Reg.* v. *London Justices* (1) was given, down to 1908—a period of sixteen years—that there was no right of appeal in cases where a person consented to be dealt with summarily under s. 12 of the Summary Jurisdiction Act, 1879. That seems to be in accordance with good sense. If a person desires to be dealt with summarily when he knows he has the right to go before a jury, and is free to do so, it seems reasonable that he should be bound by the consequences which follow on his election. But in certain cases where a person had been convicted by a Court of summary jurisdiction, he not having consented to be dealt with by that Court, a right of appeal existed. In those circumstances the Children Act, 1908, was passed, and we have to determine the effect of the language of s. 128, sub-s. 2, of that Act, which is as follows: "The First Schedule to the Summary Jurisdiction Act, 1879, shall include the offence mentioned in the Second Schedule to this Act in the same manner as if that schedule formed part of the First Schedule to the Summary Jurisdiction Act, 1879." The First Schedule to the Summary Jurisdiction Act, 1879, contains a list of indictable offences which can be dealt with

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summarily under that Act. The Second Schedule to the Children Act, 1908, refers in the first column to "Adults pleading guilty." That follows the form of the First Schedule to the Summary Jurisdiction Act, 1879. The second column of the Second Schedule to the Children Act, 1908, refers to "Adults consenting," and the form of the First Schedule of the Summary Jurisdiction Act, 1879, is again followed. Under the words "Adults consenting" in the Second Schedule to the Children Act, 1908, is the sentence "Committing an indecent assault upon a person, whether male or female, who, in the opinion of the Court, is under the age of sixteen years." Therefore the prima facie effect of s. 128 of the Children Act, 1908, is to write that offence into the First Schedule of the Summary Jurisdiction Act, 1879, as though those words formed part of that schedule. It is quite true that s. 128 of the Children Act, 1908, increases the maximum term of imprisonment which a Court of summary jurisdiction can inflict where it deals summarily with the offence of indecent assault upon a person under sixteen years of age from three months to six, and upon behalf of the applicant it has been contended that because a different punishment is introduced by the Children Act, 1908, the principle of the decision in *Reg.* v. *London Justices* (1) does not apply, because the applicant has been convicted and punished under a "future Act" within the meaning of s. 19 of the Summary Jurisdiction Act, 1879. That contention would have been very formidable if it were possible to point out any purpose for which the offence was to be taken as written into the First Schedule of the Summary Jurisdiction Act, 1879, except that of making the provisions contained in s. 12 of the Summary Jurisdiction Act, 1879, applicable to it. But counsel on behalf of the applicant admitted that he could not point out any purpose except that of giving the accused person the benefit of a summary trial by his consent, and I agree that no other purpose is apparent.

I am therefore of opinion that the prima facie and natural view of the object of the Children Act, 1908, is that the Legislature intended to put this particular offence in the same category

(1) [1892] 1 Q. B. 664.

as the other offences mentioned in the First Schedule to the Summary Jurisdiction Act, 1879, and, that being so, that the existing rule, which has not been varied by statute—it is very desirable that the law should be uniform where a person consents to be dealt with summarily—that under the Act of 1879 he has no right of appeal where he consents to be dealt with summarily, applies to the offence of which the applicant was convicted.

It was further contended on behalf of the applicant that s. 33 of the Children Act, 1908, shews that with regard to this particular offence the intention of the Legislature was to so deal with it that a person convicted summarily might appeal. In my judgment the answer to that contention is that the words of the section are "When, in pursuance of this part of this Act," a person is convicted by a Court of summary jurisdiction of an offence he is to have a right of appeal, and the applicant was not convicted in pursuance of "this part of this Act," i.e., Part II. of the Children Act, 1908. It is quite true that with regard to procedure, arrest, form of summons, and other matters the provisions of certain sections of Part II. of the Act of 1908 do apply to the offence of committing an indecent assault upon a child or young person, and therefore to the offence mentioned in the second column of the Second Schedule to that Act. On the other hand, s. 33, which is the special section giving the right of appeal, does not include the offence of indecent assault, the subject-matter of s. 128 (which is in Part VI. of the Act), but is confined to offences which are of quite a different character mentioned in "this part of this Act," i.e., Part II.

For these reasons I am of opinion that the view taken by the magistrate was right. Perhaps I may be allowed to say that I think he has put the point quite clearly and concisely in his affidavit.

The rule must be discharged.

RIDLEY J. I agree for the reasons given by the Lord Chief Justice and I do not think I can usefully add anything.

DARLING J. I am of the same opinion.

Rule discharged.

Solicitors for applicant: *C. V. Young & Son.*

Solicitors for respondent: *Wontner & Sons.*

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Nov. 5, 8, 24, 25;
Dec. 21.

[IN THE COURT OF APPEAL.]

SUTCLIFFE *v.* GREAT WESTERN RAILWAY COMPANY.

Railway Company—Carrier—Damageable Goods carried unpacked—Owner's Risk—Reasonable Condition—Railway and Canal Traffic Act, 1854 (17 & 18 *Vict. c.* 31), *s.* 7.

The plaintiff had for many years consigned to the defendants for carriage wooden cisterns lined with lead, which were fitted with a cross-bar, and had attached a lever which projected above the edge of the cistern; they were carried by the defendants unpacked at the ordinary rate of carriage and at company's risk. Many of the crossbars and levers having been broken in transit, owing, as the defendants alleged, to their brittle nature and to their not being protected by packing, the defendants gave notice in 1907 that they were not, and would not be, carriers of certain specified damageable goods (including cisterns) except when they were properly protected by packing. After the notice the plaintiff continued to consign cisterns for carriage by the defendants, but the defendants required him to sign at the time of sending a special consignment note, headed "Consignment note for damageable goods when not protected by packing." The consignment note contained in substance a notice that the defendants would not carry the specified damageable goods (a list of which was given) at company's risk except when properly protected by packing, but that the sender might consign them not so protected if he agreed to relieve the defendants from liability for loss or injury, except on proof that it arose from wilful misconduct on the part of their servants. Then followed a form of agreement by which the sender agreed to the above terms and also to the conditions on the back of the consignment note, one of which conditions was, "The company will not be liable for any loss of, or damage to, or delay of goods resulting from their not being properly protected by packing." There was no alternative rate of carriage. The plaintiff having sued to recover damages for injury done to cisterns in course of transit:—

Held by Buckley L.J. and Kennedy L.J. (Vaughan Williams L.J. dissenting), that the goods were carried by the defendants by virtue of their statutory obligation under s. 2 of the Railway and Canal Traffic Act, 1854, to afford reasonable facilities for the carriage of traffic; that the requirement of packing was not a refusal of reasonable facilities; and that the condition imposed on the carriage of unpacked articles in the signed consignment note was a just and reasonable condition within the meaning of s. 7 of that Act.

Appeal from the judgment of a Divisional Court affirming the decision of the judge of the Halifax County Court.

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The claim of the plaintiff was for damage to goods delivered by him to the defendants for carriage by them to various stations on their railway. The goods in question were wooden flushing cisterns lined with lead, fitted with a crossbar, and having attached a lever which projected above the edge of the cistern. For about thirty years the defendants had carried similar cisterns unpacked at the ordinary rate of carriage and at company's risk, and they had carried them on the same terms for the plaintiff for about sixteen years; but a large number of the crossbars and projecting levers, amounting to about 20 per cent. of the whole, were broken in course of transit, owing, as the defendants alleged, to their brittle nature and to their not being protected by packing. In October, 1907, the defendants gave notice that they were not, and would not be, carriers of certain specified damageable goods (including cisterns) except when they were properly protected by packing. The cisterns the subject of the present action were consigned by the plaintiff at Halifax in October, November, and December, 1907, for carriage by the defendants, and a special consignment note was signed by the plaintiff or his representative at the time of sending; the plaintiff alleged that the consignment notes were signed under protest. The consignment note was in the following form :—

"Great Western Railway.

"Consignment note for damageable goods when not properly protected by packing.

"The Great Western Railway Company hereby give notice that they are not and will not be carriers of the following damageable goods, except when properly protected by packing, and that the rates quoted by the company for the carriage of such goods, when the company undertake the ordinary liability of a railway company, do not apply to the said goods except when so protected, but the sender may at his option consign the said goods, not so protected, if he agrees to relieve the company and all other companies or persons over whose lines the same may pass, or in whose possession the same may be during any portion of the transit, from all liability for loss or injury to the

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same, except upon proof that such loss or injury arose from wilful misconduct on the part of the company's servants.

"The following is a list of damageable goods, but is not exhaustive, and the company reserve to themselves the right to refuse to be carriers of other descriptions of goods not properly protected, except upon the before-mentioned terms:—

[Here followed the list of goods.]

"To the Great Western Railway Company, Station.
, 190 .

"In consideration of your receiving and forwarding the undermentioned goods, not properly protected by packing, and of the consequent saving to me of the cost of packing, and of the reduced weight of the consignment, and of any other advantage which I derive therefrom, I agree to relieve the Great Western Railway Company and all other companies or persons over whose lines the goods may pass, or in whose possession the same may be during any portion of the transit, from all liability for loss or injury to the same, except upon proof that such loss or injury arose from wilful misconduct on the part of the company's servants. I also agree to the conditions on the back hereof.

"This agreement shall be deemed to be separately made with all companies or persons parties to any through rate under which the goods are carried.

"Signature of sender or his representative

"Address ."

Here followed a description of the goods, their weight, the name and address of consignee, &c.

The words "Owner's Risk" were written on the face of the note.

Condition 12 of the general conditions on the back of the consignment note ran thus: "The company will not be liable for any loss of, or damage to, or delay of goods resulting from their being not properly protected by packing." There was no alternative rate of carriage for the goods.

Several levers and crossbars having been broken in the course of transit of four consignments of cisterns, the present action was

brought in the Halifax County Court to recover 1*l.* 12*s.* 6*d.*, the agreed amount of damage, if the defendants were liable. The learned county court judge held, on the authority of *Simons* v. *Great Western Railway* (1), that the condition was not just and reasonable within s. 7 of the Railway and Canal Traffic Act, 1854, and that, though negligence on the part of the defendants had not been proved, they had been guilty of default, as common carriers, in not carrying the goods safely; he therefore gave judgment for the plaintiff. The Divisional Court (Darling and Jelf JJ.) affirmed his decision, but granted leave to appeal.

Lush, K.C. (*H. T. Waddy* with him), for the defendants. The county court judge was wrong in holding himself bound by the decision in *Simons* v. *Great Western Railway* (1) to find the condition unreasonable. In that case the goods had been lost, and the condition was held unreasonable on the ground that the want of packing might not have any relation to the loss of the goods. The defendants were not common carriers of these cisterns; they were only bound to fulfil the statutory obligation of giving reasonable facilities for their carriage imposed by s. 2 of the Railway and Canal Traffic Act, 1854: *Dickson* v. *Great Northern Railway* (2); they were not bound to take and carry unpacked things which reasonably ought to be packed. It is a reasonable term to annex to the contract for carriage of damageable goods that the carrier will only be liable for damage in transit if the goods are protected by packing; it would be a hardship to compel him to carry them unpacked on the terms that he was to be an insurer of their arrival in an undamaged state. In Macnamara on Carriers by Land, 2nd ed., p. 131, the law is correctly stated to be that "a railway company may refuse to receive goods where the packing is so defective that, owing to the character of the goods and the nature of the journey, their condition will entail upon the company extra care and extra risks: *Munster* v. *South Eastern Railway*." (3) Though the defendants are bound under s. 2 of the Act of 1854 to give reasonable facilities for the carriage

(1) (1856) 18 C. B. 805. (2) (1886) 18 Q. B. D. 176.
(3) (1858) 4 C. B. (N.S.) 676.

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of traffic, they are not bound to give facilities for the carriage of unpacked articles which, by reason of the absence of packing, are liable to be damaged in the course of transit, and, that being so, s. 7 of the Act has no application; if, on the other hand, the defendants are bound to give facilities for the carriage of unpacked articles, the conditions of carriage imposed by the defendants are just and reasonable within the meaning of s. 7. A carrier can at any time give notice that he will no longer be a common carrier of a particular class of goods: *Crouch* v. *London and North Western Railway* (1); he cannot, indeed, get rid of his statutory liability to afford reasonable facilities for carriage, but his common law obligation is a matter of choice. The Act of 1854 did not touch the liability of railway companies as common carriers; it merely superadded a statutory obligation to give reasonable facilities for the carriage of any kind of goods. There is no cause of action under s. 7 unless the plaintiff can shew that the goods were damaged by the neglect or default of the company or its servants; there is no evidence in the present case of neglect, and the county court judge has only found the defendants guilty of default on the assumption that, as common carriers, they were insurers of the goods, notwithstanding their notice that they were not, and would not be, common carriers. In the case of goods easily broken in transit it is a reasonable condition for the railway company to say that they will carry them, if packed, at the ordinary rate and at company's risk; it is unnecessary that they should offer alternative rates of carriage: *Beal* v. *South Devon Railway.* (2) [He also cited *Peek* v. *North Staffordshire Railway* (3); *Great Western Railway* v. *McCarthy* (4); *Sheridan* v. *Midland Great Western (Ireland) Railway.* (5)]

Powell, K.C. (*Acton* with him), for the plaintiff. The point that there was no evidence of neglect on the part of the defendants or their servants was not taken by the defendants at the trial in the county court and is not open to them here. The defendants had been common carriers of similar cisterns for

(1) (1854) 14 C. B. 255.
(2) (1864) 3 H. & C. 337.
(3) (1863) 10 H. L. C. 473.
(4) (1887) 12 App. Cas. 218.
(5) (1888) 24 L. R. Ir. 146.

thirty years, and the subsequent notice given by them did not relieve them of their common law liability as insurers of goods entrusted to them for carriage. The case is outside s. 2 of the Act of 1854, except so far as the defendants are obliged by that section to afford reasonable facilities for the carriage of traffic. No doubt the effect of that section is that a railway company may relieve itself of some of the obligations of a common carrier, but it cannot get rid of its liability for neglect and default. Prima facie evidence of neglect is given by shewing that goods were in good condition when delivered to a railway company for carriage and that at the end of the transit they were broken, and the onus is shifted on to the railway company of disproving neglect; that is so whether they are common carriers or statutory carriers under the Act of 1854. The company is responsible unless it can shew that it has made conditions of carriage which are within the Act, and that the loss or damage is due to something which comes within those conditions. In each case the Court must look at the particular article carried and see whether it is such as a railway company is bound to carry under the Act of 1854, and, if so, whether the condition annexed to its carriage is reasonable. This condition is unreasonable both as regards the classes of articles to which it assumes to apply and also as regards the particular article carried; it applies to cisterns and tanks as classes of articles, and this article comes within the class, not because it has a lever attached and is therefore more easily damaged, but because it is a cistern or tank; it is qua cistern or tank that the notice on the face of the consignment operates, and such a condition is too wide and is unreasonable. It is clear that s. 7 is applicable to the case of a railway company which, although under no obligation to carry certain goods, nevertheless makes a contract for their carriage: *Wilkinson* v. *Lancashire and Yorkshire Railway* (1); and the question must arise in each case whether the signed condition is just and reasonable. [He also cited *King* v. *Burrell* (2); *Doe* d. *Dacre* v. *Dacre* (3); *Phipps* v. *New Claridge Hotel* (4); *Ashendon*

(1) [1907] 2 K. B. 222.
(2) (1840) 12 Ad. & E. 460, at p. 468.
(3) (1798) 1 Bos. & P. 250, at p. 257.
(4) (1905) 22 Times L. R. 49

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v. *London, Brighton, and South Coast Railway* (1); *Harrison* v. *London, Brighton, and South Coast Railway.* (2)]

Lush, K.C., in reply.

Cur. adv. vult.

Dec. 21. The following written judgments were read:—

VAUGHAN WILLIAMS L.J. This appeal depends upon two questions. (1.) Were the railway company entitled to refuse to carry at the risk of the company, except in the case of wilful default of the servants of the company, the cisterns which are the subject of this action, unless packed, which I think means to the satisfaction of the company? (2.) Was the special contract which was signed by the plaintiff, and which relieved the company from all liability except for wilful default, just and reasonable within the meaning of s. 7 of the Railway and Canal Traffic Act, 1854? If the railway company are entitled to refuse to carry such cisterns unless so packed, it seems to follow that any terms upon which the company may choose to carry them are in the nature of concessions, and that no terms upon which only the company are willing to carry them can be pronounced unreasonable, for there is no standard of reasonableness in such a case, and s. 7 of the Act could have no application. See the judgment of Lindley L.J. in *Dickson* v. *Great Northern Railway.* (3)

I shall presently set forth sufficient of the facts to make it clear why I think this appeal depends upon these two questions. I think, however, that I shall make the basis of my judgment more clear if I first state certain conclusions at which I have arrived. (1.) That the defendant railway company profess to carry cisterns, and that the requirements as to packing, which the company impose if the cisterns are to be carried at the risk of the company, are conditions of conveyance and not attributes of the thing conveyed. If milk is sent by railway and the company require that the milk shall be delivered to the company for carriage in vessels of specified material, size, or shape, in my judgment the railway company are carriers of milk, and the

(1) (1880) 5 Ex. D. 190, at p. 194. (2) (1860) 2 B. & S. 122.
(3) 18 Q. B. D. 176.

material, size, and shape of the milk churn or vessel are conditions of the carriage of milk. If this is not so, the Railway and Canal Traffic Act, 1854, fails to remedy the very mischief it was passed to prevent, for the railway company has only by a general notice to tell the public that it is not a carrier of certain articles unless delivered to the railway company in vessels or cases of a specified character, which vessels or cases might be of a very expensive character, or very inconvenient for the carriage of the article in fact intended to be forwarded by railway to its destination, and the consignor would practically be compelled by the monopolist railway to accept any terms, reasonable or unreasonable, which the railway might choose to impose as a condition of the carriage of the article in question, and the railway company, to use the language of Blackburn J. in delivering his opinion in the House of Lords in *Peek* v. *North Staffordshire Railway* (1), would take again the advantage which railway companies at one time took in abuse of the powers of the Carriers Act, 1830, and the cases decided under it, and "evade altogether the salutary policy of the common law." (2.) That notwithstanding the words "occasioned by neglect or default" in s. 7 of the Railway and Canal Traffic Act, 1854, defining for the future the liability of railway companies for the loss of or injury to articles in the receiving, forwarding, or delivery thereof occasioned by the "neglect or default" of the company or its servants, the object of the section is to prevent undue restriction by railway companies of their common law liabilities as common carriers, and the meaning is that conditions of such a character are void or valid ab initio and before loss or injury accrued, according as they are or are not just and reasonable. Blackburn J. in *Peek* v. *North Staffordshire Railway* (2) says: "I would only observe that in my view of the matter it is quite immaterial in this (*Peek* v. *North Staffordshire Railway* (3)) as it was in that case (*Harrison* v. *London, Brighton, and South Coast Railway* (4)) whether the injury arose from the neglect of the company or not. The condition, as I think, was either void or valid ab initio, and before the injury accrued. If it was valid, it protected the defendants, even

(1) 10 H. L. C. 473, at p. 507.
(2) 10 H. L. C. at p. 514.
(3) 10 H. L. C. 473.
(4) 2 B. & S. 122.

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Vaughan Williams L.J.

though the injury was occasioned by their neglect; if it was void, there was nothing to relieve the defendants from their common law liability as carriers."

The authorities on this point prior to *Peek* v. *North Staffordshire Railway* (1), on which Blackburn J. made the observations which I have quoted, may, I think, be thus stated. Cockburn C.J. in the case of *Harrison* v. *London, Brighton, and South Coast Railway* (2), after stating "that upon the facts stated in this case we should not be justified in drawing the inference that there was actual negligence on the part of the company," proceeds to hold that the special contract was not just and reasonable within that section. It is true that this judgment was overruled by the Exchequer Chamber on the question of "just and reasonable," but not on the question of application of s. 7. The Court of Exchequer Chamber was divided on the question whether s. 7 is confined in its application to cases in which the loss or injury was occasioned by misconduct and did not apply where it occurred through pure accident, and the judgment of the Court was delivered on the assumption that the application of the section was not so confined, but, without determining the question, Vaughan Williams J. and Channell B. preferred to limit their decision to finding that the particular contract was just and reasonable, and this was the ground on which the Court of Exchequer Chamber reversed the decision of the Court of Queen's Bench. Wilde B. differed from the rest of the Court, holding that the contract was unreasonable, and must, therefore, have been of opinion that s. 7 applied. It may be doubted, however, whether since the decision in the House of Lords in *Peek's Case* (1) the judgment of the Exchequer Chamber in *Harrison* v. *London, Brighton, and South Coast Railway* (2), even on the point on which the Court was nearly unanimous, namely, in holding the condition in that case reasonable, is to be relied on as an authority. The case of *Simons* v. *Great Western Railway* (3) was also approved of in the House of Lords, and in particular the judgment of Jervis C.J., in which he, speaking of s. 7 of the Act

(1) 10 H. L. C. 473. (2) 2 B. & S. 122.
(3) 18 C. B. 805.

of 1854, uses words which are thus summarized: "The section will run thus. General notice to limit liability shall be null and void, but the parties may make special contracts provided those contracts are adjudged by the Court or a judge to be just and reasonable." (1)

Since *Peek* v. *North Staffordshire Railway* (2) there has been the decision in *Ashendon* v. *London, Brighton, and South Coast Railway* (3), which was a case in which the county court judge found as a fact that the dog was lost without any neglect or default of the servants of the defendant company, but was of opinion that the condition was unjust and unreasonable, and gave judgment for the plaintiff for ten guineas. The Exchequer Division, consisting of Kelly C.B. and Hawkins J., held on an appeal on a case stated, which in par. 9 stated that the dog was lost without any neglect or default on the part of the railway company, that the condition was unjust and unreasonable within the Railway and Canal Traffic Act, 1854, s. 7, as it contained no exception for loss or damage occasioned by the negligence or wilful misconduct of the company or their servants. And Hawkins J. says in his judgment in *Ashendon* v. *London, Brighton, and South Coast Railway* (4): "Had the defendants by their conditions stipulated, as they easily might in a very few words, simply that they would not be responsible for loss resulting from mere accident without neglect or default; such restriction of their common law liability would have been both just and reasonable, and if embodied in a signed contract, would have protected them against liability for the loss which occurred." It is plain that in this case the Court could not have considered that s. 7 was limited in its operation to cases where misconduct on the part of the railway company was proved. Having stated these conclusions, I will now deal with the facts of this case and the findings of the county court judge.

The case was tried in the Halifax County Court. The claim of the plaintiff is a claim against the defendants as common carriers for damage to goods delivered to the defendants, to be safely carried for hire from Halifax to various places, on several

(1) 10 H. L. C. at pp. 483, 576.
(2) 10 H. L. C. 473.
(3) 5 Ex. D. 190.
(4) 5 Ex. D. at p. 194.

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dates from October 25 to December, 1907. The plaintiff is a manufacturer of sanitary things, wooden flushing cisterns, lined with lead; these had for thirty years been carried at company's risk at certain rates. On September 25, 1907, the West Riding District Goods Managers' Conference passed a resolution to the following effect: "West Riding District Goods Managers' Conference. September 25, 1907. 902. W.C. cisterns wood lined with lead. It was reported that claims are being made at Halifax in respect of W.C. cisterns wood lined with lead and it was agreed that the agents should jointly inform the firm concerned that unless the cisterns are packed in crates or cases sufficiently strong to secure the fittings against damage claims will be refused." On October 23, 1907, the railway company's agents (also agents for other railway companies) saw plaintiff's clerk, and said that from that date all flushing cisterns consigned by the plaintiff would be carried only at owner's risk, unless protected by packing, but that no alteration would be made in the rates.

There was considerable correspondence between the plaintiff and the railway company, in which, amongst other things, the plaintiff asked to have the cisterns carried at a reduced rate if they were to be carried at "owner's risk." But this was refused, and ultimately goods were sent off under four consignment notes of October 25, November 22, December 2, and December 6, 1907; three of these had the words "owner's risk" written on the face. These were signed by the plaintiff. The consignment note is on red paper, printed on the lower half of the face of the paper; it runs thus: [His Lordship read the consignment note as above set out.]

Above this consignment note there is printed a notice, the heading of which is as follows: [His Lordship read the notice.] Then follows a list of damageable goods, which list is stated not to be exhaustive, and the company reserve to themselves the right to refuse to be carriers of other descriptions of goods not properly protected, except upon the before-mentioned terms. In the list there are over a hundred articles mentioned, including "cisterns, cast iron, cisterns, iron or steel (not wrought or enamelled), or wooden (not lined with lead), such as can be

carried in an ordinary truck. Wrought iron enamelled." It will be observed that it is cisterns not lined with lead which are included in this list of damageable goods, and that cisterns lined with lead, which are the cisterns in question in this case, are not included, but the notice contains these words: "The following is a list of damageable goods, but is not exhaustive, and the company reserve to themselves the right to refuse to be carriers of other descriptions of goods not properly protected." And, moreover, the company's general regulations, p. 4, contain a list of things which are carried by special arrangement only, and this list includes articles not packed which are consequently liable to damage or loss. (I have not seen this regulation or any copy, but assume that it was put in evidence and that its effect is properly stated by the learned county court judge.) Some of the articles mentioned seem to be articles which might be of a character not requiring packing protection. At the back of the consignment note are printed "General Conditions," the twelfth of which is: "The company will not be liable for any loss of, or damage to, or delay of goods resulting from their being not properly protected by packing."

The county court judge in his judgment says: "This condition, namely, the twelfth condition, I think does not govern the matter, for it is not shewn that the damage which occurred did result from the goods being not properly protected by packing: it might have arisen from the want of care of the defendants' servants." And he further says: "It is admitted that 'owner's risk' means that the railway company are not to be liable except for wilful misconduct." The judgment continues thus: "Up to October 23, 1907, the company had for many years accepted the plaintiff's cisterns unprotected by packing for carriage without special contract. These cisterns had levers projecting at the end, which often got broken in transit, and on October 23, 1907, the railway companies gave notice that all flushing cisterns would thenceforth only be carried at owner's risk unless properly protected by packing and that no alteration in the rate would be made." This, no doubt, refers to the oral notice above mentioned. The general notice, however, itself says: "The rates quoted by the company for the carriage of such goods,

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when the company undertake the ordinary liability of a railway company, do not apply to the said goods, except when so protected." The learned judge goes on: "Afterwards in pursuance of the notice" (that in future all cisterns would be treated as damageable goods) "the company before accepting for carriage the parcels in question (being flushing cisterns unprotected by packing) required the words 'owner's risk' to be written on the consignment notes. The company charged the same rates as before, and would have continued to take the same goods, if packed, at the company's risk. The plaintiff contends that the 'owner's risk' stipulation was not just and reasonable, because no alternative rate was presented to him, but the goods unless packed had to either go at owner's risk, or were refused." Then he goes on: "The defendants say that the plaintiff had his alternative, inasmuch as he could by packing have had them carried at the company's risk." The learned judge seems to me to find that, though negligence on their part may not have been proved, it was default, they being common carriers, not to carry the goods safely; unless the damage was occasioned by inherent vice or defect of the article, the carrier is answerable. He then cites *Shaw* v. *Great Western Railway* (1) and says: "It is not proved here that the injuries arose through the exposure of the projecting levers, or the want of packing; it may well have been caused by carelessness on the part of the company's servants. The case is thus distinguished from *Barbour* v. *South Eastern Ry. Co.*" (2) In *Shaw* v. *Great Western Railway* (1) Wright J. says "It is clear law that a common carrier by land is in the absence of exemption by statute, contract, or notice, or on the ground of fraud, liable for all loss or damage to the goods which he carries for hire." In *Barbour* v. *South Eastern Railway* (2) the damage was found by par. 8 of the case to have been occasioned by the neglect of the consignor to pack.

This judgment of the county court judge contains some findings in law and some in fact. In so far as it states "it was default, they being common carriers, not to carry the goods safely; unless the damage was occasioned by inherent vice or

(1) [1894] 1 Q. B. 373. (2) (1876) 34 L. T. (N.S.) 67.

defect of the article the carrier is answerable," I think that the statement that this was default, on the assumption that the company were common carriers, was a statement of law; but I think that the county court judge meant to find as a fact that the company were carriers of wooden cisterns lined with lead, and that the damage was not caused by inherent vice or defect of the article, and the latter part of this finding is confirmed by the words "even if it were possible to regard the unpacked cisterns as having an inherent defect tending to damage them without any adventitious cause." It seems convenient at this point to deal with the question whether the delivery of the cisterns in a broken condition was "neglect or default" within the meaning of those words in s. 7 of the Railway and Canal Traffic Act, 1854. I do not think these two words mean the same thing. I am inclined to think that as used in s. 7 "neglect" means the omission to do some act which the carrier ought to have done, and that this involves the failure to do a specific act leading to some loss or damage which, if proved, the consignor might complain of, which perhaps may be described by the term actual negligence. "Default" seems to me to cover every failure by the defendant to perform his obligations as a carrier at common law as qualified by statute at the moment of the passing of the Act of 1854. I think that the mere delivery by the railway company of the articles carried in a broken state is "default," and I think that the special contract in the present case was intended to relieve the company from liability in respect of the delivery of the articles in a broken condition without throwing on the company the obligation of shewing how the breakage occurred, that is, was intended to relieve the company from its common law liability as common carriers. The question is, Was the special contract containing such a condition just and reasonable under the circumstances existing at the time of the delivery of the goods to be carried and the making of the special contract?

The surrounding circumstances were that such cisterns had been carried for some thirty years at the risk of the company at the same rate as charged in the present contract. It is shewn, as found by the learned judge, that the projecting levers

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of the cisterns often got broken. The losses complained of in the plaint consisted partly of broken levers and partly of broken crossbars. Some statement was put before us during the argument shewing the proportion to be about one-third crossbars. This plaintiff comes to the railway company and says "I have these things which I want you to carry as they are." The railway company do not refuse to carry these goods at all, but as a matter of fact take them upon what they say is the contract between the parties. They do not by this contract accept liability as insurers, nor even for negligence on the part of their servants, but only accept liability in case of wilful misconduct being established against their servants. The plaintiff says that this contract does not bind him because s. 7 of the Railway and Canal Act, 1854, applies unless this special contract, or contract by signed special acceptance, is not found by the judge to be just and reasonable. In my opinion, in the absence of a valid special contract in cases where the company delivers goods in a damaged condition, the onus is on the company to prove any circumstances which may relieve themselves from liability, and the onus is not on the plaintiff to shew how the loss or damage occurred as a condition of the application of the proviso in s. 7. In my opinion the proviso in s. 7 deals simply with what contracts a carrier may make limiting his common law liability, and if the contract he makes is not just and reasonable it is of no effect, and the efficacy of the contract does not depend upon the circumstances of the damage or loss; and the right of the consignor to disregard an unjust or unreasonable contract does not depend upon such circumstances occurring after the contract.

I treat the words "occasioned by the neglect or default of such company or its servants" as defining the liability which the company may not exclude by notice or special contract or special acceptance, and I think that what we have to decide is whether the contract in question does or does not exclude by its terms a liability which the Act forbids to be excluded unless the circumstances at the time of delivery to the company of the article for carriage are such as to make the exclusion of liability contained in the contract just and reasonable. I think that the outcome

of the conditions imposed by the company is that, if goods were packed to the satisfaction of the company, the company would carry them at ordinary rates at the company's risk, but the goods, unless so packed, had either to go at owner's risk or were refused. It is to be observed that in the notice of September 25 the packing is required to be in crates or cases sufficiently strong to secure the fittings against damage. It is also to be observed that the general notice speaks of loss or damage. One does not see how want of packing should be the cause of the loss of a cistern. It is plain, moreover, that loss and damage by negligence on the part of the company's servants, except wilful, is loss or damage against which the company is relieved, and is negligence for which by the common law a carrier is liable.

Sect. 12 of the general conditions on the back of the way bill says "The company will not be liable for any loss of, or damage to, or delay of goods resulting from their being not properly protected by packing." I think the railway company has to prove that the loss, damage, or delay so resulted. Moreover, delay can hardly be the result of want of packing. I think that if in fact the railway company were common carriers of these cisterns the condition imposed was unreasonable. I think that the county court judge by his judgment finds them to be common carriers; so that, if the agreement is null and void as not being found by the judge to be just and reasonable (which I agree is a question of law applied to the circumstances found by the learned judge), the railway company are fixed with liability as common carriers of these cisterns. I do not think that the fact that the company require goods which they profess to carry to be packed prevents their being common carriers of such goods.

As to the absence of evidence of negligence, I think that in the case of a common carrier delivery of things in a broken condition is evidence of default, but, even if this is not so, I do not think that the absence of proof of negligence was a point made before the county court judge having regard to ss. 120 and 121 of the County Courts Act, 1888. Altogether I think the condition was unreasonable, and that the decision of the Divisional Court and that of the county court judge should be affirmed, and this appeal dismissed.

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BUCKLEY L.J. By s. 2 of the Railway and Canal Traffic Act, 1854, the company is under statutory obligation to afford according to its power all reasonable facilities for forwarding "traffic," a word which by the definition in s. 1 includes goods. But it is not under a statutory obligation to carry all goods. The matter is controlled by the word "reasonable" in this section. The company could, for instance, refuse to carry a girder of such length as that it could not be loaded so as to travel safely round the curves of the railway, or an animal (say an elephant), or a package of such height or bulk as that it would not pass under the bridges of the railway, or liquid in open vessels which would necessarily slop or spill in the course of transit. To take another instance, which serves to bring out more plainly the limitations of the section. Suppose that petroleum were brought down to the railway station in a tank waggon with a tap and were offered to the railway company for carriage as liquid, it would be a question of fact, I think, whether it was reasonable to require the company to carry it when tendered in bulk without a containing vessel and to require that for that purpose the company should provide a proper vessel which presumably would be a tank constructed as a truck to receive it for the purpose of carriage. If this was not reasonable, then the company could not be called upon to carry petroleum in bulk at all. As regards goods which it is not by statute bound to carry under s. 2, the company is at liberty to impose any such conditions, reasonable or unreasonable, as it thinks fit as the only conditions upon which it will carry the goods. This is true whether the obligations of the company to carry which are under consideration are those under the common law or those under the statute. Secondly, assuming that the goods are such as the company is by statute bound to carry under s. 2, discrimination must next be made between its responsibility as a common carrier and its responsibility as a carrier bound by statute to carry. The railway company is not bound to accept for carriage as a common carrier any goods which it does not profess to carry. Animals are within s. 1. The company is under s. 2 bound to carry a dog, but it is not bound to carry a dog as common carrier, and if the company expressly refuse to

be common carriers of dogs, they can at common law refuse to carry dogs except upon their own terms. Those terms may be reasonable or unreasonable: *Dickson* v. *Great Northern Railway*. (1) But the company is by statute bound to carry a dog, and in respect of its statutory obligations to carry it, the company is governed by the provisions of s. 7 of the Act. Its liability in this respect is governed wholly by the provisions of the statute. Under the earlier part of that section and before reading the first proviso, the liability of the company would, as Lord Esher M.R. said in *Dickson* v. *Great Northern Railway* (1), be that of bailees for reward, but there then follows the proviso which enables the company to impose conditions such as shall be adjudged by the Court or judge to be just and reasonable. The liability of the company, therefore, is not that of common carriers, is not that of bailees for reward, but is that which is defined by the statute.

The goods here in question are wooden cisterns lined with lead, fitted with a crossbar, having attached to it a lever which projects above the edge of the cistern. I can find no ground for saying that goods such as these are outside s. 2. They are goods, I think, which the company may carry, if they are so minded, as common carriers, and must, whether they are so minded or not, carry under the provisions of s. 2 with the protection to the company given by s. 7. The company did in fact down to October 23, 1907, carry such cisterns as these unprotected by packing without imposing any terms with regard to them. It does not, I think, follow that they were accepting them for carriage as common carriers, but, if they were, their profession to carry them was terminated on October 23, 1907, when they gave notice that they would thenceforth carry them only at owner's risk unless properly protected by packing. After that notice they were receiving such cisterns unprotected by packing either (*a*) as common carriers upon terms which, so far as their position as common carriers is concerned, they were entitled to impose, or (*b*) (which I think is the true view) as a company lying under a statutory obligation to carry them upon the terms of s. 7. The question

(1) 18 Q. B. D. 176.

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then is whether, within the first proviso in that section, the condition which they attached that the cisterns should be properly protected by packing was or was not such as ought to be adjudged by the Court or judge to be just and reasonable. This, I think, is a mixed question of fact and law. The material facts were as follows: The fact that the goods were such as upon inspection they are found to be, namely, goods with certain fragile parts projecting beyond the cistern itself; the fact that the company in 1907 gave the notice which I have mentioned, because the levers frequently got broken in transit; the fact that a certain large relative number of them were broken; and the fact that the plaintiff, by the contract which he signed, referred to the goods as being goods not properly protected by packing. Upon the facts of the case it was for the judge to say as matter of law whether the condition was under those circumstances reasonable. This is an appeal from the county court, and this Court cannot, of course, review the judge upon a question of fact. But I cannot find that as a matter of fact he has found that the condition was unreasonable. He has said that the twelfth condition does not govern the matter, for that it was not shewn that the damage which occurred did result from the goods not being properly protected by packing, and although the judgment is ambiguous, I do not think, fairly read, there is any finding of fact in the matter. As matter of law I am of opinion that upon the facts stated the condition was reasonable. This amounts to a decision of the appeal in favour of the railway company.

But the company are, I think, entitled to succeed upon a second ground. In my judgment a point of law arising upon the words "neglect or default" in the earlier part of s. 7 is open to the appellant. Upon a question of law no doubt this Court cannot entertain an appeal upon a point of law which was not raised before the judge. But the point need not necessarily be one which was raised by the parties. It may be one raised by the judge himself, and if it has been decided by the judge, it seems to me impossible to say that it was not so raised as that it is open on appeal. This point was, I think, expressly decided by the judge. He says: "I think that the company were responsible under the earlier part of s. 7, for though negligence on

their part may not have been proved, it was default, they being common carriers, not to carry the goods safely." The point then being open, I have to look to see whether neglect or default was proved. Upon the judge's finding I think that neither the one nor the other was proved. That is involved in the sentence which I have just read. He finds that negligence was not proved. He finds that default was proved, but the default upon which he relied was, I think, one which as matter of law could not be asserted. He says "it was default, they being common carriers, not to carry the goods safely"; that is to say, he casts upon the company a liability to stand as insurer, which would follow from the character of common carrier, when the fact was that the company were not common carriers of these goods, but were carrying them under the obligation, whatever it is, which is imposed by the statute. Sect. 7 is a section which, as regards the statutory carrier, makes him liable only for loss occasioned by neglect or default, adding that by force of the statute he necessarily remains so liable notwithstanding a notice to the contrary, unless it be such a notice as is allowed by the proviso. Assuming that the condition was not reasonable, so that the notice is ineffectual, and the company remains exposed to the statutory liability, it is a liability for loss occasioned by neglect or default. It is for the plaintiff, I think, to prove that that statutory liability has attached. He has given no evidence of neglect or default, and for this I think he must fail.

In my judgment this appeal should be allowed with costs and judgment entered for the railway company with costs.

KENNEDY L.J. The material facts of this case as I understand them are few, simple, and undisputed. The plaintiff, a manufacturer at Halifax, sued the defendants in the Halifax County Court in respect of four lots of lead-lined cisterns which he had at different times in the period October—December, 1907, sent by the defendants' railway from Halifax to various places in England. In each consignment two or more of the crossbars and levers, which form projecting parts of all such cisterns, were injured in transit, and the plaintiff sued the defendants for damages in respect of such injury. For sixteen years previously

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the plaintiff had sent such articles, as he sent these, wholly unprotected by packing, and frequent breakages having occurred to these projecting parts during this period, the defendants, shortly before the date of the first of the consignments in question, gave notice to the plaintiff, and presumably to other consignors, that in future they would not carry these goods, except when properly protected by packing, under the ordinary terms of liability, but that the consignor might at his option send the goods not so protected if he agreed to relieve the carriers from all liability to loss or injury, except upon proof that such loss or injury arose from wilful misconduct on the part of the company's servants. From the printed matter which appears upon the form of agreement signed by the plaintiff in respect of the articles in question it appears, but does not form part of the contract, that the defendants treated a large number of other articles classed as "damageable goods" in the same way about the same time.

In respect of each of the consignments in question the plaintiff, who chose to continue to send his cisterns without any protection by packing, signed an agreement which contained the terms relieving the defendants from all liability for loss or injury, except upon proof that such loss or injury arose from wilful misconduct on the part of the defendants' servants, and also certain other printed conditions which are irrelevant to the consideration of the present case. The plaintiff signed in every case under protest; and, as some part of every consignment was injured in transit, he commenced, as above stated, in respect of all the four, an action for damages in the county court. At the hearing of the case the learned county court judge held that the plaintiff was entitled to succeed, and on appeal the Divisional Court (Darling J. and Jelf J.) upheld his judgment, and the defendants now appeal to this Court against that decision.

At the trial before the learned county court judge the facts which I have stated already were either proved or admitted. There does not appear to have been in regard to damaged consignments any direct evidence adduced as to the cause of the injury to the levers or crossbars which were damaged, nor is there in the judgment of the learned county court judge any

positive or explicit finding on this point. Holding as a matter of law that the signed contract was not reasonable, he decided that the defendants were liable because, though negligence on their part may not have been proved, there was no proof that the injuries arose through the exposure of the projecting levers or want of packing, and they may, he says, well have been caused by carelessness on the part of the defendants' servants, and he held the defendants responsible for "default" under s. 7 of the Railway and Canal Traffic Act, 1854, as common carriers who had failed to carry the goods safely, and who had not proved that the damage had been caused by inherent vice or defect in the article carried.

The learned county court judge appears to have arrived at the conclusion that the terms of the signed contract were not just and reasonable, (1.) because the defendants offered no alternative rate, and (2.) because the exemption of liability extended protection to the railway company not only in the case of damage occasioned by the want of packing, but also in the case of damage caused by negligence of the defendants not amounting to wilful misconduct. In the Divisional Court Darling J. seems to base his judgment mainly, if not entirely, upon the second of these two grounds. The judgment of Jelf J. proceeds wholly upon the first. "The essential point," he says, "in this case is that no higher rate is suggested."

On the hearing of the appeal against these judgments we were assisted by a considerable amount of argument on the part of the counsel engaged in the case as to the general law which, under statute or otherwise, governs the duties and liabilities of railway companies in regard to the carriage of goods. For the purpose of my judgment in the present case it is, in my view, necessary only to say, in reference to this discussion, that from the numerous judicial authorities—and amongst those I wish particularly to refer to are the opinion of Blackburn J. in the leading case of *Peek* v. *North Staffordshire Railway* (1) and the judgment of Lindley L.J. in *Dickson* v. *Great Northern Railway* (2)—I think that the following propositions, relevant to the consideration of the present case, may be deduced: (1.) A

(1) 10 H. L. C. 473. (2) 18 Q. B. D. 176.

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railway company is bound to afford all reasonable facilities for the carriage of all goods, as traffic (Railway and Canal Traffic Act, 1854, s. 2), other than dangerous goods dealt with by the Railways Clauses Act, 1845, s. 105. (2.) It does not follow that the railway company is under the liability of a common carrier in respect of the goods which they are bound by statute to carry: see Lindley L.J. in *Dickson* v. *Great Northern Railway.* (1) (3.) Whether in the case of particular goods the railway company is a common carrier or not depends upon what the railway company habitually does or proposes to do in respect of such goods: see Lindley L.J. in *Dickson* v. *Great Northern Railway.* (1) (4.) A railway company cannot restrict its liability in regard to damage to goods arising from its neglect or default except by such conditions in the form of a written contract signed by the consignor as it can satisfy the Court or judge before whom any question relating thereto shall be tried are just and reasonable (Railway and Canal Traffic Act, 1854, s. 7), the burden of proof resting upon the railway company: see per Lindley L.J. in *Dickson* v. *Great Northern Railway.* (2) (5.) The question of the justice and reasonableness of such conditions is a question of law to be determined by the Court or judge alone upon the circumstances of each particular case: see per Blackburn J. in *Peek* v. *North Staffordshire Railway* (3) and Lord Herschell in *Great Western Railway* v. *McCarthy.* (4) But it is perfectly proper for the judge, in the case of trial with a jury, to ask the jury, if material facts are in dispute, to assist him in ascertaining what the circumstances are by a finding as to such disputed facts; and, in the case of an appeal from a county court judge on the question of the reasonableness and justice of a contract, his findings upon disputed matters of fact, if there is any evidence to support them, are binding upon the Court of Appeal. To this extent, and to this extent only, I think, is the question of justice and reasonableness, in the words of Lord Watson, a mixed question of law and fact: *Great Western Railway* v. *McCarthy.* (5) (6.) Except in respect of the limitation of its liability

(1) 18 Q. B. D. 176, at p. 185.
(2) Ibid. at p. 188.
(3) 10 H. L. C. 473, at p. 511.
(4) 12 App. Cas. 218, at p. 229.
(5) Ibid. at p. 233.

for damage arising from its neglect or default, a railway company may (subject to statutory provisions as to rates of charge) make its own terms for the carriage of goods by any contract or notice, "brought home" to the customer, of which a carrier of goods might avail himself before the passing of the Railway and Canal Traffic Act, 1854, provided always that such terms are consistent with the fulfilment of its statutory duty to afford reasonable facilities for such traffic: see per Wright J., pronouncing the judgment of the Divisional Court in *Shaw* v. *Great Western Railway* (1), recently followed by Darling J. in *Duckham* v. *Great Western Railway*. (2)

The substantial question on the present appeal is, as it seems to me, that of the justice and reasonableness of the written contract signed by the plaintiff. It was to this that the argument of Mr. Montague Lush, in support of the appeal, was mainly directed. But he raised also another point, which, if I correctly appreciated his contention, was that the defendants were not common carriers of cisterns unprotected by packing, and "therefore" (to quote the language of Willes J. in *Richardson* v. *North Eastern Railway* (3)) "stand in the position of ordinary bailees and are liable only in respect of some negligence established against them by evidence"; and, as there was in the present case no proof of negligence, and indeed no finding by the county court judge that the damage was so occasioned, the liability of the defendants was not made out at the trial. My present view is that Mr. Lush is right in contending that default in s. 7 means something analogous to negligence and not merely a failure to carry safely, but, be the argument of the defendants which I have just stated sound or unsound, I do not think it is open to us to consider it or to decide the appeal upon such a ground. We must deal with the case as it was tried, and a careful consideration of the arguments of counsel as they appear in the judge's notes and of his judgment lead me upon the whole (for the matter is left in some doubt) to prefer the view that Mr. Lush's contention, if I understand it aright, was not so developed or put as a distinct ground of defence at the trial as to

(1) [1894] 1 Q. B. 373. (2) (1899) 80 L. T. 774.
(3) (1872) L. R. 7 C. P. 75, at p. 81.

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justify me in treating it as such now. The main issue there taken was as to the justice and reasonableness of the signed contract. If that contract ought to be held valid, the defendants, admittedly, are entitled to succeed; and, speaking for myself, I do not think that this Court is in a position properly to decide the case except upon this single issue.

The question of "justice and reasonableness," within the meaning of s. 7 of the Railway and Canal Traffic Act, 1854, has given rise to judicial exposition in many reported cases depending upon written contracts signed by the customer, and in some of them, and notably in the leading case of *Peek* v. *North Staffordshire Railway* (1), to difference of opinion between very eminent judges upon the same state of facts. Certain points, however, I take to have been by this time established for our guidance: First, the general rule that there is no fixed criterion, but that the validity of the contract in each case must be considered according to the circumstances of that case. Secondly, that a condition exempting the carriers *wholly* from liability for the neglect and default of their servants is prima facie unreasonable, but is not necessarily in every case unreasonable and void: see per Blackburn J., *Peek* v. *North Staffordshire Railway*. (2) Thirdly, that the existence or the absence of a fair and reasonable alternative rate is an important element in considering the justice and reasonableness of a contract which wholly or in part relieves a railway company from liability for negligence and default: see *Peek* v. *North Staffordshire Railway* (1); *Great Western Railway* v. *McCarthy* (3); *Lewis* v. *Great Western Railway* (4); *Ashendon* v. *London, Brighton, and South Coast Railway*. (5) But the contract may be good although the railway company offers no such alternative rate: see for example *Beal* v. *South Devon Railway*. (6) Fourthly, that the retention in the contract of the company's liability for loss or damage proved to have been caused by the wilful misconduct on the part of the company's servants is a material element in considering the

(1) 10 H. L. C. 473.
(2) Ibid. at p. 511.
(3) 12 App. Cas. 218.
(4) (1877) 3 Q. B. D. 195.
(5) 5 Ex. D. 190.
(6) (1860) 5 H. & N. 875; affirmed in the Exchequer Chamber, 3 H. & C. 337.

justice and reasonableness of the contract: see *Lewis* v. *Great Western Railway* (1) and per Hawkins J. in *Ashendon* v. *London, Brighton, and South Coast Railway.* (2)

I have thought it right to state these propositions so that it may be clear that they have been borne in mind in considering the present case and in arriving at the conclusion that the conditions of this contract ought to be held to be just and reasonable in the circumstances. The case is, in some important respects, peculiar. For some sixteen years the defendants had carried these articles, upon ordinary terms, unpacked. Experience has shewn that the projecting and fragile parts, unprotected by packing, have, as the plaintiff's witness said, "constantly," or, as the learned county court judge himself states in his judgment, "often" got broken in course of transit. The defendants thereupon gave notice that they would no longer profess to carry these articles on the ordinary terms of the carrier's liability if without proper protection by packing. I think they were entitled to do so, and did not violate their statutory duty to afford "reasonable facilities" for traffic under s. 2 of the Railway and Canal Traffic Act, 1854. They cannot truly be said to have refused to carry the articles. The company did not refuse to undertake in regard to such goods to be carriers under the ordinary risks. The requirement of proper packing, that is to say such packing as was necessary, as experience had proved, to ensure the goods being carried with a reasonable prospect of safety, in no way constitutes such a refusal. A common carrier, whether a railway company or other, is, I think, not bound to carry articles which are tendered for carriage without such protection of packing as is necessary to enable the company to carry the goods with a reasonable prospect of security during transit: see per Sir William Jones, Law of Bailments, Appendix on Common Carriers, p. vi., and per Williams J. in *Munster* v. *South Eastern Railway.* (3) In the course of his judgment in *Barbour* v. *South Eastern Railway* (4), a case in which the customer had sent by rail furniture which he had refused to pack, Cleasby B. said: "No person is entitled to claim compensation from others

(1) 3 Q. B. D. 195.
(2) 5 Ex. D. 190, at p. 195.
(3) 4 C. B. (N.S.) 676, at p. 701.
(4) 34 L. T. (N.S.) 67.

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for damage occasioned by his neglect to do something which it was his duty to do." It appears to me that after their notice the railway company would have been within their rights in refusing to carry these cisterns with the fragile parts unprotected. In my view they were entitled to refuse to carry them in that condition except under a special contract. Why is this particular contract unjust or unreasonable? There is no need here of an alternative rate, for the railway company is, as I have said, willing to carry these goods with their fragile parts upon the ordinary terms of risk and at the existing rate of charge if they are properly protected by packing. If a customer alleged that the packing required by the railway company in any particular case was needless or excessive, there would be a question for the tribunal which, in case of dispute, would have to decide the facts. In the present case no such point was raised by the plaintiff. The burden upon the customer involved in this is, in my humble judgment, one which the defendants as carriers were entitled to ask the customer to bear before accepting the goods at all; but at any rate it seems to me that, as an alternative, the option given to the customer of sending the goods, if protected by packing, at the ordinary rate is quite as just and reasonable an option as an offer would be to carry the goods if unprotected by packing at a higher rate of charge. The defendants, be it remembered, under this contract for the carriage of unpacked cisterns, do not seek to protect themselves against *all* liability; they leave themselves still liable for damage found to be caused by the wilful misconduct of their servants. Jelf J. calls this an "illusory" exception. It was not so treated by Hawkins J. in *Ashendon's Case* (1), in the passage to which I have referred, or so treated by the Court of Exchequer in *Beal* v. *South Devon Railway.* (2) I prefer the view expressed emphatically by Pollock C.B. in the last-mentioned case. (3) "I think," says the learned Chief Baron, "it would be indecent if we were, in a judgment of this Court, to recognize the existence of any difference between cases where a railway company is the plaintiff

(1) 5 Ex. D. 190, at p. 195.
(2) 3 H. & C. 337.
(3) 5 H. & N. 875, at p. 884; 29 L. J. Ex. 441, at p. 445. The citation is from the latter report.

or defendant, and any other individual who may not be so well able to bear the expense of law and the consequences of a loss of the suit. I think the difficulty of proof does not make a condition reasonable or unreasonable."

The further objection to the justice and reasonableness of this contract is taken by the learned county court judge, and by Darling J. in the Divisional Court, that the protection from liability is not confined to damage occasioned by the absence of proper packing. I cannot quite follow the reasoning of this objection. The very purpose and object of the statutory permission to bind the customer by a written and signed contract is to enable the carrier (upon just and reasonable terms) to restrict the liability under which he would lie, according to the earlier proviso of the same 7th section, for damage caused by his negligence and default. There is no need of a signed contract to protect him from liability for injury arising from the customer's own conduct, for which, in regard to the unsafe condition of the goods, the carrier cannot in any case be held responsible.

Only one further remark as to the reasons assigned by the learned judge of the county court for his conclusion. He seems to have been influenced by the judgment of the Court of Common Pleas in *Simons* v. *Great Western Railway* (1) (see especially the judgment delivered by Jervis C.J. at p. 830) in regard to the carriage of unpacked furniture. I do not take this view. The question was presented to the Court in that case upon a demurrer to the third plea. The particular circumstances as to the existence of risk owing to the fragility of the goods, if unpacked, do not appear; and, further, in that case the railway company had stipulated for a total, and not, as here, only a partial, exclusion of liability.

I am glad to find that the view which I have taken of the present case in favour of the defendants is in accord with the judgment of Lord Salvesen in the Scotch case of *Munro* v. *North British Railway* (2), of which a shorthand note was supplied to us, and in which he held a similar contract, relating to

(1) 18 C. B. 805. (2) Unreported.

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the carriage of furniture not protected by packing, to be just and reasonable.

Appeal allowed.

Solicitors for plaintiff: *Fielder & Jones, for R. Wilkinson, Halifax.*

Solicitor for defendants: *L. B. Page.*

W. J. B.

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[IN THE COURT OF APPEAL.]

RUSSELL *v.* AMALGAMATED SOCIETY OF CARPENTERS AND JOINERS AND OTHERS.

Trade Union—Restraint of Trade—Illegality of Society at Common Law—Rules of Society—Claim to Benefit under Rules—Action against Society—Trade Union Act, 1871 (34 & 35 *Vict. c.* 31), *ss.* 3, 4.

Where the rules of a society combined provisions for the militant purposes of a trade union and provisions for the provident purposes of a friendly society, and it was provided by one of the rules that members of the society might be expelled, with the result that they would forfeit all future benefit from the funds of the society, for non-compliance with the decisions of committees directing the militant operations of the society or for violating the recognized trade rules of the district:—

Held, that the main object of the society was illegal at common law, as being in restraint of trade, and that the rules relating to its provident purposes were so inseparably connected with that object as to be affected by its illegality, and therefore unenforceable; and consequently that an action for moneys alleged to have become payable to a member under those rules was not maintainable.

Swaine v. *Wilson*, (1889) 24 Q. B. D. 252, and *Gozney* v. *Bristol Trade and Provident Society*, [1909] 1 K. B. 901, distinguished.

APPEAL from the judgment of Phillimore J. on points of law raised by the pleadings in an action which had been ordered to be disposed of before the trial.

The action was brought by the plaintiff as the personal representative of her deceased husband, who had been a member of the defendant society, which was registered under the Trade Union Acts of 1871 and 1876, against the defendant society and

the trustees of its funds. The plaintiff claimed from the defendants certain sums, which she alleged to be due from them to her as representative of her deceased husband. The claim was put in various ways by the statement of claim, but, so far as material to this report, the claim was that the sums in question were due under the rules of the society with regard to sick and superannuation benefit to its members. The defence, so far as material to this report, was that, if there were any contracts subsisting between the defendants and the plaintiff's husband at the time of his death by virtue of the defendants' rules, which the defendants denied, they were in restraint of trade, and therefore the plaintiff could not recover upon them.

The rules of the defendant society, so far as material, were as follows :—

The objects of the defendant society were by rule 2 of their rules declared to be : "to raise funds for the advancement, protection, and organization of the trade ; to render legal assistance to members for the recovery of wages ; for the mutual support of its members in cases of sickness, accident, and superannuation ; for the burial of members and their wives ; for loss of tools by fire, water, or theft ; for assistance to members out of work ; and to assist (to a reasonable extent) any branch or district desirous of joining with other organized branches of trade with which our members are identified, either in the ship or house building industries, with a view to advancing the general conditions of labour ; also, as directed in the following rules, to form a contingent fund, which shall be used for the purpose of granting assistance in cases of distress not otherwise provided for by these rules ; to aid our own or any other organized trade ; to take legal proceedings under the Employers' Liability Act, and Workmen's Compensation Act, on behalf of members who may have been injured, or met their death by accident in the United Kingdom."

The society was by the rules to be divided into local branches, which were to appoint their own officers and conduct their own business ; and the rules provided for the appointment of such officers, and the constitution of committees of such branches, and for the holding of meetings and conduct of business by them.

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Rule 8 provided for the payment by members of the society of certain periodical contributions, in return for which they were to be entitled to all benefits under the rules. These contributions included a yearly contribution to a "special fund for trade movements." By clause 8 of that rule it was provided that "all moneys subscribed by the members of this society shall be the property of the society generally, and not of the branches to which the members respectively belong, and shall be held for and devoted to the payments of the benefits specified in these rules: and any branch leaving the society shall forfeit all the money it has accumulated." Rule 9, clause 1, provided for the making of general levies on the members of the society by the executive council of the society in cases provided for in clauses 3 and 5 of the rule, and also in other cases of emergency, after the executive committee had laid the proposal for the levy before the whole of the members and obtained the consent thereto of a two-thirds majority of the votes of members present at special branch meetings as therein provided. By clause 3 such a levy might be made when the cash balance of the society was found to have fallen below a certain amount per member. By clause 5 of the same rule it was provided that "In the event of any great struggle between capital and labour, in our own or any other trade, with no immediate prospect of a settlement, the executive council shall, when requested by ten branches outside the area affected, at once take a vote of the whole of the members in the United Kingdom on the question of a levy (which must not exceed 3*d.* per week per member) for the purpose of supplying the men affected with pecuniary support at the earliest opportunity."

Rule 11 was headed "Election of Officers for the Management of Trade Movements." By clause 1 of that rule it was provided that, "whenever it may be decided by the majority present at a summoned meeting of the members of the society in any locality that a change in the existing code of working rules, or in the trade regulations and customs of the district, is desirable, or for the better carrying out of the local working rules and customs of the trade, a committee for the management of the movement, to be called the 'managing committee,' may be appointed by the

aforesaid summoned meeting, such committee to remain in office twelve months." Clause 3 of the same rule provided that "in the event of a dispute where there are more than ten members in receipt of trade privileges (1), a strike or lock-out committee shall be appointed at a summoned meeting of the members on strike." By clause 6 it was provided that, "in all towns or districts where more than one carpenters' and joiners' society is established, a 'united trade committee' may be formed, composed of representatives of the various societies."

Rule 13 provided for the election by the society of an executive council, general council, general secretary, assistant secretary, treasurer, and other officers for the society at large. Subsequent rules provided for the duties to be performed by the various officers and committees of the society. By rule 27, clause 1, it was, among other things, provided that, "whenever notice has been given to or received from the employers proposing an alteration of working rules, the managing committee or united trades committee shall have power to suspend the working of overtime in the district until a settlement has been arrived at."

By rule 29, clause 10, it was provided that "On receipt of an application from a branch or district for leave to solicit their employers for any new privileges, the executive council shall immediately consider the same, and, if circumstances warrant, grant the application; but, should the employers fail to comply with, or make no reply to, the request made, the branch or district so applying must again consult the executive council as to their future course. Under no circumstances will any branch or district be allowed to strike without first obtaining the sanction of the executive council. . . . . The executive council shall have full power to declare a strike closed whenever they may deem such a course necessary."

Rule 36, which was headed "Trade Privileges," contained provisions as to allowing strike pay to members. Clause 2 of that rule provided for payment of a weekly amount to members of the society who had been at least six months in the society leaving their employment under circumstances satisfactory to the branch, branch committee, managing committee, district

(1) As to the meaning of "trade privileges," see rule 36.

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committee, or executive council. Clause 3 of the same rule provided that, "In any town or district where the managing committee, united trade committee, branch committee, or a summoned meeting of the branch consider it to their best interest that our members should refuse to work with non-union men, they shall be entitled to trade privileges."

Clause 6 provided that "all members out of employment previous to, or during the progress of a strike, or lock-out, in the ship or house building trade, where at least one-sixth of the members of any district or branch are affected, if not disentitled in accordance with clause 2 of this rule, shall be entitled to trade privileges, irrespective of the branch of trade they were last employed at. Any member in receipt of trade privileges shall be supported as per rule until he again obtain employment, provided that no member shall receive strike pay for more than six weeks after the close of a strike or lock-out, but, should he, during the progress of a strike or lock-out, obtain temporary employment in the district in which the dispute is pending, he shall be entitled to strike pay should he be discharged before the expiration of six weeks subsequent to the close of the dispute. Members resuming work after the close of a dispute, and being discharged, shall be entitled to trade privileges for six weeks, dating from the close of the dispute. Any member or members who may be withdrawn from their employment on the instruction of the managing committee, united trade committee, branch committee, or branch shall be entitled to trade privileges for any period not exceeding six weeks. Should they obtain employment, all claim to trade privileges shall cease, and should they be again thrown out of employment, they shall only be entitled to unemployed benefit in conformity with rule 37."

Rule 37 and subsequent rules provided for various payments, in the nature of friendly society benefits, to members under the heads of "Unemployed Benefit," "Tool Benefit," "Sick Benefit," "Accident Benefit," "Superannuation Benefit," and "Funeral Benefit."

Rule 48 was headed "Misconduct of Members." Clause 1 provided that "It shall be competent for any managing committee, branch committee, or branch at a special or quarterly

meeting, to fine (the amount not to exceed 2*l.*), suspend, or expel any member from the society upon satisfactory proof being given that such member has refused to comply with their decision, or by his conduct brought the society into discredit, wilfully violated the recognized trade rules of the district in which he is working, [? by] taking a sub-contract or piece-work, or working for either of these classes of employers (sub-contractor or piece-worker being defined as a person taking the labour of a job only, and not supplying the material), or fixing, using, or finishing work which has been made under unfair conditions, either in the United Kingdom or abroad, or contrary to the recognized trade rules of the district in which it has been prepared, or has fraudulently received or misapplied the funds of the society, or the moneys of any member or candidate entrusted to him for payment to the society; or belonging to any labour bureau, or similar institution, or holding any official capacity in the same." Subsequent clauses provided for the punishment of other kinds of misconduct by members of the society.

Phillimore, J. gave judgment for the defendants. (1)

Danckwerts, K.C., and *Chalmers-Hunt*, for the plaintiff. The rule which the plaintiff is seeking to enforce is not such a rule as, when taken in conjunction with the rules of the society generally, would be unenforceable at common law. A contract of a trade union, the objects of which are only partially in restraint of trade, is divisible, and, so long as restraint of trade is not substantially the sole object of the society, the portion of the contract which is not tainted by illegality can be enforced by action. The present case falls within the principle laid down by

(1) The contention put forward for the plaintiff in the Court of Appeal, namely, that there was nothing in the nature of the defendant society or its rules to make the defendant society an illegal one, or the agreement contained in the rules upon which the plaintiff relied illegal, at common law, and therefore nothing to prevent the plaintiff from recovering the amount claimed upon that agreement, was not discussed before Phillimore J., counsel for the plaintiff admitting that upon the authorities, as they then stood, it was not open to him in the Court below. Before Phillimore J. other points were relied on for the purpose of shewing that under the circumstances the plaintiff had a cause of action against the society. These points were not raised by the plaintiff's counsel in the Court of Appeal.

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Fletcher Moulton L.J. in *Gozney* v. *Bristol Trade and Provident Society* (1), that the question does not depend upon what is the main object of the society, but that "so soon as it is clear that one of the objects of a society is a separate and distinct object and that it is carried out independently, no question of its order of importance can have any legal bearing or effect." An agreement in restraint of trade is not necessarily bad, nor is a strike necessarily illegal, though a strike may be carried out illegally: *Gozney* v. *Bristol Trade and Provident Society* (2); *Collins* v. *Locke*. (3) The first question, therefore, in the present case is whether the objects of this society are so in restraint of trade as to be illegal at common law, and to so affect the rules of the society as a whole that they are not capable of being severed for the purpose of enforcement in a Court of law. Secondly, if some of the objects are legal and others are not, this does not entail the consequence that the rules which are legal cannot be enforced. Looking at the particular rules, there is no rule, with the exception of some portions of rule 48, which may not be held to have been properly made for the bona fide purpose of protecting the funds of the society, and the rules as a whole are not illegal because those portions of rule 48 may be in restraint of trade; the rules as a whole go no farther than is reasonably necessary for the protection of the funds, and the case comes within *Swaine* v. *Wilson*. (4) There is nothing illegal in the rule which provides for assisting members of other trade unions who may be on strike.

[VAUGHAN WILLIAMS L.J. Rule 36, clause 3, is clearly in restraint of trade.]

Even if rule 36, clause 3, is not a rule intended to protect the funds, it is perfectly reasonable having regard to the legitimate objects of the society, one of which is the improvement of the condition of the men.

[They also cited *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (5); *Maleverer* v. *Redshaw* (6); *Baker* v. *Hedgecock* (7);

(1) [1909] 1 K. B. 901, at p. 921.
(2) [1909] 1 K. B. 901.
(3) (1879) 4 App. Cas. 674.
(4) 24 Q. B. D. 252.
(5) [1892] A. C. 25.
(6) (1669) 1 Mod. 35.
(7) (1888) 39 Ch. D. 520.

Old v. *Robson* (1); *Howden* v. *Yorkshire Miners' Association* (2); *Rigby* v. *Connol* (3); *Denaby and Cadeby Main Collieries* v. *Yorkshire Miners' Association* (4); *Mineral Water Bottle Exchange, &c., Society* v. *Booth.* (5)]

Simon, K.C., and *J. Oddy* (*Clement Edwards* and *R. L. Reiss* with them), for the defendants. The question whether the defendant society is or is not a legal society at common law must be decided entirely by an examination of the rules: *Gozney* v. *Bristol Trade and Provident Society.* (6) Upon the face of the rules of the defendant society its main objects are clearly those of a trade union, its friendly society purposes being ancillary only. In respect of at least five of the provisions contained therein the rules specifically provide for an illegal restraint of trade; and by reason thereof the society as constituted under the rules is an illegal society at common law. If so, this action cannot be maintained, for, though by s. 3 of the Trade Union Act, 1871, it is provided that the purposes of a trade union are not by reason of their being in restraint of trade to be unlawful so as to render void or voidable any agreement or trust, by s. 4 nothing in the Act is to enable any Court to entertain any legal proceeding with the object of directly enforcing (inter alia) agreements for the application of the funds of a trade union to provide benefits for members. Rule 29, clause 10, and rule 36, clauses 3 and 6, construed by the light of rule 48, clause 1, and the latter clause itself, all provide for illegal restraint of trade. Rule 29, clause 10, gives power to the executive council of the society to interfere with and control the legal right of individual workmen to work for a particular employer or to refuse to do so, by giving the council power to call for a strike, or, where there has been a strike, to order the workmen to return to work. Rule 36, clause 3, enables the different committees of the society therein mentioned in effect to determine whether members of the society shall or shall not be allowed to work with non-union workmen. Clause 6 of the same rule provides for the withdrawal of members from their

(1) (1890) 59 L. J. (M.C.) 41.
(2) [1905] A. C. 256.
(3) (1880) 14 Ch. D. 482.
(4) [1906] A. C. 384.
(5) (1887) 36 Ch. D. 465.
(6) [1909] 1 K. B. 901, at p. 919.

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employment on the instruction of a managing committee, branch committee, or branch of the society. Rule 48, clause 1, interferes in the most sweeping manner with freedom of trade, and enables the committees therein mentioned to compel members of the society to obey their decisions and to observe trade union rules by giving power to expel a member from the society altogether in case of disobedience by him, in which case he loses all future benefit under the rules. It is impossible to maintain that the friendly society objects of the defendant society and the rules relating to them can be severed from the trade union objects and the rules relating to them. The scheme of the rules makes the two elements inseparable; for the power to enforce the trade union objects of the society arises from the power given by the rules to deprive recalcitrant members of the friendly society benefits. The rules of the societies concerned in *Swaine* v. *Wilson* (1) and *Gozney* v. *Bristol Trade and Provident Society* (2) were different altogether from those of the defendant society. There it was held that, the general purposes of the societies respectively being friendly society purposes, the fact that there were some merely ancillary rules, which might possibly involve to some extent a restraint of trade, but which were reasonable or severable from the general body of rules, did not constitute the society illegal. Here the main purpose, or at any rate an essential purpose, of the society is in restraint of trade, and the trade union and friendly society objects and rules are inextricably combined. *Hornby* v. *Close* (3) is an authority for the defendants. The rules upon which the decision in *Farrer* v. *Close* (4) turned were not in the same terms as the present rules of the defendant society. This very society as now constituted under the rules was held by Bruce J. to be an illegal society in a case of *Sayer* v. *Amalgamated Society of Carpenters and Joiners.* (5)

[They also cited *Hilton* v. *Eckersley* (6); *Old* v. *Robson* (7); *Cullen* v. *Elwin.* (8)]

Chalmers-Hunt, for the plaintiff, in reply.

(1) 24 Q. B. D. 252.
(2) [1909] 1 K. B. 901.
(3) (1867) L. R. 2 Q. B. 153.
(4) (1869) L. R. 4 Q. B. 602.
(5) (1902) 19 Times L. R. 122.
(6) (1856) 6 E. & B. 47.
(7) 59 L. J. (M.C.) 41.
(8) (1903) 88 L. T. 686; (1904) 90 L. T. 840.

VAUGHAN WILLIAMS L.J. The point which has been argued before us was not argued before Phillimore J., because it was considered by the counsel for the plaintiff that, upon the decisions prior to *Gozney* v. *Bristol Trade and Provident Society* (1), which was decided subsequently to the argument before Phillimore J., that point could not successfully be maintained in the Court below. I am inclined to agree with the view that the decisions antecedent to *Gozney* v. *Bristol Trade and Provident Society* (1) are inconsistent with the contention now put forward by the plaintiff, but, in my opinion, there is really nothing in the judgments given in that case which supports the plaintiff's contention. It has been established by the judgments delivered in *Swaine* v. *Wilson* (2) that, although it is provided by s. 4 of the Trade Union Act, 1871, that "nothing in this Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely. . . . 3. Any agreement for the application of the funds of a trade union—(*a*) to provide benefits to members," yet such a proceeding may be entertained in the case of a trade union so constituted as to be a legal association at common law, and apart from the provisions of s. 3 of the Trade Union Act, 1871, which provides that "the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust." The question, therefore, which we have in this case to decide is whether the defendant society is a legal society apart from the provisions of s. 3 of the Act of 1871, so that an action such as the present could have been maintained by the plaintiff at common law, or whether the rules of the defendant society are so far in restraint of trade that at common law no action could be [maintained by the plaintiff.

I wish, before referring to the rules of the society, to say a word or two with regard to the principles which must govern one's conclusion in dealing with the question whether the rules of the society are so far in restraint of trade as to render them unenforceable by an action at law. It is not

(1) [1909] 1 K. B. 901. (2) 24 Q. B. D. 252.

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every restraint of trade which will render the provisions of an agreement unlawful, in the sense that it cannot be enforced by action at common law. To have that effect a restraint of trade must be such as in some way to prejudice the interests of the community. It may do that in a case where the freedom of contract of an individual is restricted to an unreasonable extent by an agreement which he has entered into, or in a case where the area from which employers, not parties to the agreement, can seek to obtain workmen is unreasonably restricted. It may be observed, in passing, that it cannot be said in the latter case, as it can in the former, that the restraint of freedom of trade arises in consequence of the voluntary action of the party whose freedom is restrained; for, in a case where, for instance, the rules of a trade union prohibit their members from working with non-union men, there is a restraint of trade to the prejudice of employers and workmen other than members of the trade union, quite independently of any action of their own.

I propose now to call attention in detail to the rules of the defendant society, so far as material to my decision in this case. I may say at once that there are, in my judgment, amongst these rules a considerable number which are clearly in restraint of trade in the sense that they must operate to the prejudice of the interests of the community. I shall have a few words to say presently with regard to the question whether these rules are divisible for the purpose of enforcing those of them which are not open to objection; but, before saying what I have to say on that subject, I propose to refer to the rules, merely remarking, before doing so, that I quite recognize that there may in such cases sometimes be subsidiary rules, not affecting the main object of an association, which may be more or less in restraint of trade, and yet not prevent the other rules of the association which are free from that objection from being enforced. In my opinion, however, this is a proposition which only applies to rules which do not go to the main object of the association. If one finds rules which really by their character indicate the object of an association, and the object so indicated is in its nature, or by reason of the manner in which it is to be worked out, inconsistent with the public interest, I think that one is bound to hold

that the character of such rules, taken as a whole, is such as to preclude a Court from giving effect to individual rules here and there amongst them, which, taken by themselves, might be unobjectionable.

The defendants' counsel, in going through the rules, has called our attention to five matters on which he relied, as shewing that the main object of this association involves such a restraint of trade as to make its rules unenforceable according to the well-established principles upon which agreements in restraint of trade are held to be invalid. I may say in passing that, though the provisions with which we are dealing are in form rules, and not clauses of an agreement, they stand on the same footing as the latter for the purposes of our decision.

The first rule relied upon by the defendants' counsel is clause 10 of rule 29, which runs as follows. [The Lord Justice here read the clause.] I must say that I am inclined to regard that clause, taken by itself, as being one which gives to the executive council, not power to order a strike, but rather power to prevent a strike, by providing that a branch or a district shall not strike without first obtaining the sanction of the executive council. It might, perhaps, be said that, in a case where the executive council give their sanction to a strike, they in effect order a strike, because, under those circumstances, the powers given by rule 48, clause 1, could be put in force as against a member of the society who refused to comply with their decision; but I rather doubt myself whether that is the right view to take of the clause, and, if that clause stood alone, I should hesitate somewhat to say that, per se, it was such as to constitute a restraint of trade which would make the rule an unlawful rule. The next rule to which I wish to refer is rule 36, clauses 3 and 6. [The Lord Justice here read those clauses.] It was argued for the defendants with regard to those clauses that, coupled with the power of expulsion and other powers of coercion given by rule 48, clause 1, they clearly shewed that the defendants' rules constituted an unlawful restraint of trade. With regard to clause 3, which provides that, where one of the committees of the union therein mentioned considers it to the best interest of the members of the union that they should refuse to work with

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non-union men, they shall be entitled to trade privileges, it appears to me that this clause does involve a restraint of trade inconsistent with the public interest. The same observation seems to me to apply to clause 6, the important words of which are those providing that any members who may be withdrawn from their employment on the instruction of one of the committees of the union therein mentioned shall be entitled to trade privileges. The effect of the rules seems to me to be that the members in question must leave work when they are so withdrawn by the instructions of the committee.

Then, again, rule 48, clause 1, appears to me most material for the purpose of shewing that the rules contemplate such a restraint of trade as to render them generally unenforceable in law. [The Lord Justice here read the clause.] In my opinion that clause, in substance, from beginning to end amounts to such a restraint of trade as necessarily to render its provisions unlawful. It trespasses against the principle of freedom of contract. The workman is not to be allowed to take a sub-contract or do piecework, or to work in fixing, using, or finishing work which has been made under conditions which the union may consider unfair, and, if he does so, he is liable to be expelled from the union. From every point of view this clause is, in my opinion, of such a character that it must of necessity tend seriously to hamper and restrain trade.

Such being the character of the particular rules to which I have referred, I have now to consider the rules generally, in order to see whether those particular rules are capable of being severed from the rest and treated individually as being in restraint of trade, and therefore unenforceable, without treating the whole object of the association as being such as to render its rules incapable of being enforced. In dealing with this question I desire to point out that this is not a case in which there is a complete separation of the purposes of the society as regards the fund applicable to what I may call friendly society purposes and that applicable to the trade union purposes provided for as I have mentioned by the rules. In some cases there have been rules which provided for such a separation. This is not such a case. If the expulsion clause contained in rule 48, clause 1, be

looked at, it will be seen that, if a member of the society refuses to comply with any decision of a managing or branch committee, or of a branch, he may be expelled from the society, and will thereupon lose, not merely a specific amount in which he might be mulcted by a fine or penalty, but all those future benefits from the funds of the society, in the nature of friendly society benefits, which, as a thrifty man, he sought to ensure through subscription to the society. It is impossible, when one is judging of the object of this society, to leave out of consideration the fact that a breach of the trade union rules or directions by a member involves the liability to loss of all the friendly society benefits, for that fact goes a very long way towards the conclusion that the main object of this society is that of a trade union and not that of a friendly society. I come to the conclusion that at common law, and apart from s. 3 of the Trade Union Act, 1871, these rules are of such a character that an action would not lie to enforce the benefits in the nature of friendly society benefits thereby provided for, because the whole object of the society is one which involves such a restraint of trade as to render its rules as a whole unenforceable, although individual rules, taken by themselves, may be unobjectionable.

I do not think that the judgment which I am giving in any way trenches upon the proposition, which is now undoubted, that a strike is not necessarily unlawful; that it is not illegal to persuade men to determine their contracts with their employer lawfully, or not to work for an employer, unless the workmen can obtain some terms for which they are asking. There is nothing to my mind contrary to the rules against restraint of trade in a society's maintaining such strikers by providing them with funds. A strike may of course be so conducted as to be not only unlawful, but criminal, but there is no suggestion here of anything of that kind.

With regard to the authorities which have been cited, it may be observed that the rules of the defendant society have been before Courts on previous occasions. In each of the cases where the rules at present in force have had to be considered, it appears to have been held that they did involve such an illegality as being in restraint of trade that they were unenforceable.

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I ought, I think, to say before concluding my judgment that I have carefully considered the decisions in the cases of *Swaine* v. *Wilson* (1) and *Gozney* v. *Bristol Trade and Provident Society* (2), and I do not believe that anything which I have said in the present case is in any way inconsistent with either of them. In both of those cases the rules were very different from those in the present case. I decide this case on the ground that, if the rules of this society be taken as a whole, it is plain that the main object of the society is one which involves such a restraint of trade as to render the rules unenforceable. For the reasons which I have given I think that the case for the plaintiff fails and this appeal must be dismissed.

FARWELL L.J. I am of the same opinion. The question raised by this appeal is whether the purposes of the defendant society are such as are lawful at common law, or whether they are only lawful under, and to the extent indicated in, the Trade Union Act, 1871, in which latter case this action will not lie. The answer to that question, which in my opinion turns entirely upon the construction of the rules, depends upon whether the object of the society, as appearing from the rules, involves an illegal restraint of trade.

The law as to restraint of trade is now well settled. Every contract in general restraint of trade without limit is bad, but a partial restraint limited so as to afford reasonable protection only to either or both of the contracting parties, and so as not to be injurious to the public, is good. Thus in *Horner* v. *Graves* (3), Tindal C.J. says that the "question is whether this is a reasonable restraint of trade: and we do not see how a better test can be applied to the question whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public." The present state of the law on this subject was summarized by Lord Macnaghten in the House of Lords in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (4) as follows: "The

(1) 24 Q. B. D. 252.
(2) [1909] 1 K. B. 901.
(3) (1831) 7 Bing. 735, at pp. 742, 743.
(4) [1894] A. C. 535, at p. 565.

true view at the present time, I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public." The law was similarly expressed by Lindley M.R. in *Underwood & Son* v. *Barker*. (1) He there says: "The modern doctrine, as I understand it, is that, if an agreement restraining a person from carrying on business is injurious to the public interests of this country, such agreement is invalid to the extent to which it is injurious, but not further, if it is so framed as to permit of division into two portions, one of which is good and the other bad." He then refers to certain decisions on the subject, and proceeds: "Further, it is now settled that, unless there are circumstances shewing some reasonable ground for imposing a restriction on a person's liberty to do what he can for his own support, that restriction will be held not binding upon him. According to this doctrine an agreement in restraint of trade which is wider than is reasonably necessary for the protection of the person seeking to enforce it is invalid so far as it is wider than is so necessary, and this may invalidate the whole restraint sought to be imposed, if the clause imposing it is so framed as not to be severable."

Taking that to be the law, the question depends upon the construction of the rules, which is for the Court, and not for a jury. The only facts which could be relevant, for the purpose of assisting the Court in coming to a conclusion upon that question, would be facts deposed to by witnesses giving

(1) [1899] 1 Ch. 300, at p. 304.

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evidence from which the Court could draw an inference whether the restriction imposed on trade was reasonable or the reverse, as was explained by this Court in *Leng & Co.* v. *Andrews*. (1) In the present case there are no facts in evidence to assist us in determining whether the restrictions contained in these rules are or are not reasonably necessary for the protection of parties interested or from the point of view of the public. I fail to see myself how any evidence with regard to the mode in which the rules have in practice been applied could be relevant on the question of their construction. Except in the case of ancient documents, to which the doctrine of contemporanea expositio applies, it is not legitimate to construe a document by reference to the way in which the parties thereto have acted under it. We have therefore simply to consider what, upon the terms of the rules themselves, rightly understood, the purpose of this society appears to be.

The rules fall under two heads, trade union rules proper and benefit society rules. Now trade unions were, as Lord Macnaghten pointed out in *Amalgamated Society of Railway Servants* v. *Osborne* (2), originally formed for a double purpose, one being a diplomatic and militant purpose, and the other a benevolent purpose, namely, conferring certain benefits, such as are afforded by a friendly society, on individual members of the union. The only means by which a trade union can give full effect to the former of these purposes is the power of compelling a strike and rendering assistance to the strikers. It was urged before us that a strike may or may not be lawful, and that the Court ought to assume that only lawful strikes are contemplated by the rules of the society. Admitting that it is not to be assumed that an unlawful strike is intended, in the sense of a strike involving criminal or wrongful acts, there is no such assumption with regard to a strike which is in restraint of trade: the very object of a trade union on its militant side is to obtain its ends by restraining trade, and, as this has been rendered lawful by the Trade Union Acts, there is no reason for assuming that this is not its real object and purpose. These rules undoubtedly enable

(1) [1909] 1 Ch. 763. (2) [1910] A. C. 87, 95.

such restraint to be applied; thus, the executive body may call out the men on strike for any or no reason, for their good or to their detriment, and regardless of the public welfare. Such strikes may not merely restrain, but may destroy trade, as has been the case with the shipbuilding industry on the Thames. If the rules are so framed as to give the executive this power, then they are illegal at common law and good only under the Trade Union Acts. I cannot doubt that this is their true construction, and the actual intention of the framers thereof. It is the very power that was sought and obtained by the trade unions from the legislature, namely, that they should be at liberty to order strikes whether in restraint of trade or not, and so to direct and control, and in the last resort stop the course of trade by coercion of its members, and, through them, of employers and the general public. I do not propose to go through the rules in detail. It is sufficient to refer to rule 29, clause 10, rule 36, clauses 3 and 6, and rule 48, clause 1.

It is said that, if this is so, still the benefit rules are severable, and the plaintiff is suing in respect of rights arising under benefit rules. If there were two distinct sets of rules constituting two distinct contracts with separate funds applicable respectively to militant and beneficent purposes, exclusively each of the other, the case might be different; but there are here no separate funds, and nothing to prevent funds standing to the credit of benevolent purposes from being applied to militant purposes, and the two portions of the union are bound together by the indissoluble nexus that members may be entirely expelled from the society and lose all the benefit advantages by reason of some breach of a militant rule. Moreover, this power of expulsion and consequent forfeiture of benefits is of the essence of the trade union scheme, because the union derives therefrom its whole power of effecting its militant purpose as a trade union. A member who has subscribed to a union, perhaps, for years, in order to obtain in the future the benefits in the nature of friendly society benefits provided for by the rules, will naturally hesitate long before he disobeys an order, which may involve his expulsion from the union. In *Swaine* v. *Wilson* (1) Lindley L.J.

(1) 24 Q. B. D. 252, at p. 260.

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says: "No doubt, if the real object of this society were unduly to fetter trade, its rules might all be tainted by the vice of the object, and none of the rules might be enforceable." That to my mind applies exactly to this case. This society is in my opinion a trade union pure and simple, and the fact that it has certain subsidiary objects in the way of benefit to its members does not make it the less so. The paramount object is that of a trade union, and the subsidiary objects cannot be severed from that object.

As regards the cases which have been cited, the society in *Swaine* v. *Wilson* (1) was really a friendly society, but some of its rules at first sight appeared to savour somewhat of a trade union. The Court of Appeal held that, its objects being substantially those of a friendly society, those subsidiary rules did not go beyond what was reasonably necessary for the protection of its funds, and therefore did not make it an illegal association. *Gozney* v. *Bristol Trade and Provident Society* (2) comes within the same category. Cozens-Hardy M.R. said of the society in that case, "It is a harmless friendly society and there is nothing unlawful in its objects." Neither of those cases affects the present. In the cases decided upon the construction of the present rules of the defendant society, the same view as we are taking has been taken as to their illegality. The case of *Farrer* v. *Close* (3) does not seem to have much bearing on the present, because it is said that the rules then in force were not the same, and did not contain the provisions in the present rules upon which the defendants rely. That case was very different from the present. As I read it, all the members of the Court thought the rules there in themselves unobjectionable, but two of them took into consideration the course of business which had been followed by the society in acting upon them, and held that, as that amounted to an unlawful restraint of trade, the society was an illegal one. Cockburn C.J. said in giving judgment (4): "It was urged upon us, on the argument, that the rules in question, including rule 18, s. 7, admitted of a perfectly innocent construction, and were capable of being applied to purposes only which

(1) 24 Q. B. D. 252.
(2) [1909] 1 K. B. 901.
(3) L. R. 4 Q. B. 602.
(4) L. R. 4 Q. B. 606, 607.

were within the scope of the object of a friendly society; and that, as the society professed to be a friendly society, and was established as such, the rules ought to receive such a construction as would make them consistent with that character. We should be disposed to concur in this view, if there were nothing to shew that the rules in question had, in their practical application by the society, been made subservient to the purposes of a trade union instead of being confined to those of a friendly society." And further on he says: "I think we are bound to look not only to the rules themselves, but also to the conduct and operations of the society; and that we must treat the society, not according to what it professes to be, but according to what it practically is." He therefore treated the question in that case as depending, not on the construction of the rules, but on the manner in which the funds of the society had actually been applied. That mode of dealing with the question is contrary to the view which I have expressed, but the point does not really arise in the case now before us.

KENNEDY L.J. I agree. One of the points upon which, in the course of his argument, the plaintiff's counsel insisted was that a strike is not necessarily illegal. That proposition is, I think, quite clear. It was laid down as long ago as the decision in *Farrer* v. *Close* (1), and was again repeated and emphasized by Fletcher Moulton L.J. in *Gozney* v. *Bristol Trade and Provident Society*. (2) Nobody at the present day would argue that strikes are necessarily illegal according to the law of England. That point, therefore, if material to the question in this case, may at the outset be treated as beyond dispute. The question here is whether, upon the true construction of the rules of the defendant society, the scheme of them is such as to constitute the society an illegal society at common law. If so, and if its legality for certain purposes must depend upon the Trade Union Act, 1871, then it follows that s. 4 of that Act applies, and this action cannot be maintained. This is not really an appeal against the judgment of Phillimore J. upon the points argued before him, because the point with which we have to deal

(1) L. R. 4 Q. B. 602.

(2) [1909] 1 K. B. 901.

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was excluded from his consideration by the admission of the plaintiff's counsel; and we have not to deal with the points taken before the learned judge, because they are not now insisted upon by the plaintiff's counsel.

The only question before us now is, therefore, as I have said, whether this society is an illegal society at common law. In dealing with that question I will not refer to the rules of the defendant society in detail, as they have been already fully dealt with by the other members of the Court. Speaking generally, what seems to me to be the vice of these rules is that they provide for a restraint of trade, not shewn to be reasonable, in that they involve a surrender by the members of the union of their individual freedom of action; for they provide that a member may be expelled from the society, under rule 48, clause 1, with the result that he will forfeit all future benefits, unless he renders passive, or, if required, active, obedience to the decrees of certain bodies constituted within the union under the rules. It is not immaterial to observe that the benefits from which a member may be thus excluded for disobedience to such decrees are not confined to strike pay or benefits connected with the militant portion of the scheme; they include all the benefits in the nature of friendly society benefits, from which the members of the union agree to allow themselves to be excluded if they do not comply with the decision of a certain number of members constituting a committee, or if they do various other acts, among which are included working with non-union men.

With regard to the question what amounts to a restraint of trade involving illegality at common law in a case of this kind, I cannot, I think, do better than refer to the judgment of Hannen J. in *Farrer* v. *Close*. (1) He there says: "I am, however, of opinion that strikes are not necessarily illegal. A strike is properly defined as a 'simultaneous cessation of work on the part of the workmen,' and its legality or illegality must depend on the means by which it is enforced, and on its objects. It may be criminal, as if it be part of a combination for the purpose of injuring or molesting either masters or men: or it may be simply illegal, if it be the result of an agreement depriving those

(1) L. R. 4 Q. B. 602, at p. 612.

engaged in it of their liberty of action, similar to that by which the employers bound themselves in the case of *Hilton* v. *Eckersley* (1); or it may be perfectly innocent, as if it be the result of the voluntary combination of the men for the purpose only of benefiting themselves by raising their wages, or for the purpose of compelling the fulfilment of an engagement entered into between employers and employed, or any other legal purpose." He then refers to a memorandum by Sir W. Erle on the law relating to trade unions, in which the learned author says: "As to combination, each person has a right to choose whether he will labour or not, and also to choose the terms on which he will consent to labour, if labour be his choice. The power of choice in respect of labour and terms, which one person may exercise and declare singly, many after consultation may exercise jointly, and they may make a simultaneous declaration of their choice, and may lawfully act thereon for the immediate purpose of obtaining the required terms; but they cannot create any mutual obligation having the legal effect of binding each other not to work, or not to employ, unless upon terms allowed by the combination." The learned judge then proceeds to say that "the foregoing passage clearly defines the dividing line between what is legal and what is illegal." The only qualification which, speaking for myself, I should be disposed to venture to introduce into that statement of the law is that such a mutual obligation must not extend beyond the limits of what under the circumstances is a reasonable restraint. In the present case it is clear that there is a restraint of the widest and most extreme character involved in the provision of the rules by which a member agrees to be liable to deprivation of all benefit under the rules, if he does not comply with the decisions of the various committees therein mentioned, or does any of the other things specified in rule 48, clause 1.

The present rules of this society have been considered, and held to be illegal, by three judges, namely, by Pollock B. and Wills J. in *Old* v. *Robson* (2), and by Bruce J. in *Sayer* v. *Amalgamated Society of Carpenters and Joiners.* (3) Their decisions

(1) 6 E. & B. 47, 66. (2) 59 L. J. (M.C.) 41.
(3) 19 Times L. R. 122.

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are, no doubt, not binding upon this Court, but I think this case is practically covered by the decision of this Court in *Cullen* v. *Elwin* (1) upon rules substantially similar to those which we are now considering. I desire to adopt the language of Wills J. in that case in the Court below (2), which was selected by Collins M.R. in the Court of Appeal for unqualified approval. The Master of the Rolls said in giving judgment upon the appeal: "I cannot put the point better than in the words of Wills J. After referring to the rules which provide that a member acting contrary to the interests of the society may be expelled, he said: 'How can that be said to be such a society as Lord Esher's observations (in *Swaine* v. *Wilson* (3)) apply to? The portions which are objectionable are of express intention and purpose. They are so mixed up with the friendly society part of it that any member who breaks the trade rules is liable to lose everything that he has put into the society. It seems to me that it is quite impossible to say that it is not a society with the most effectual guarantee that the members of it shall observe the rules that are made in restraint of trade. . . . The two things are mixed up inextricably and you cannot separate the one from the other. If you cannot separate the one from the other, it seems to me the illegal portion is necessarily incorporated into the scheme of the friendly society portion of the work of the society.'" I think that those observations exactly apply to the rules of the defendant society. We have had cited to us, as authority in the plaintiff's favour, the judgments in the case of *Gozney* v. *Bristol Trade and Provident Society*. (4) I do not propose to say more about that case than that nothing which I have said is in conflict with anything that was there decided. The rules of the society in that case appeared to Channell J. and Sutton J. to be such as to place the society just outside the limits of legality, whereas, in the Court of Appeal, Cozens-Hardy M.R. decided that it was "just inside those limits," an expression which would appear to indicate that a very little more would have been sufficient to induce him to come to the same conclusion as the judges in the Court below. When I look at the analysis of the

(1) 90 L. T. 840.
(2) 88 L. T. 686.
(3) 24 Q. B. D. 252.
(4) [1909] 1 K. B. 901.

law on the subject contained in the judgment of Fletcher Moulton L.J. in that case, I do not find anything which appears to me to conflict with the conclusion at which we have arrived in the present case. The rules in that case did not include the inseparable provision in restraint of trade which is contained in rule 48, clause 1, of the defendant society's rules. It appears to me that, upon the grounds which I have expressed, our judgment on this appeal ought to be for the defendants.

Appeal dismissed.

Solicitor for plaintiff: *O. C. Kent.*

Solicitors for defendants: *Corbin, Greener & Cook.*

E. L.

KIRKBY, APPELLANT *v.* TAYLOR, RESPONDENT.

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Revenue—Stamp—Medicinal Preparation—Exemption — Chemist "who hath served a regular apprenticeship"—Contract of Apprenticeship not in Writing—Medicines Stamp Act, 1812 (52 *Geo.* 3, *c.* 150), *s.* 2; *Schedule, Special Exemptions.*

Sect. 2 of the Medicines Stamp Act, 1812, imposes a penalty upon any person vending or exposing to sale any packet, box, bottle, pot, phial, or other inclosure containing any of the drugs, preparations, or compositions set forth in the schedule to the Act without a proper paper cover, wrapper, or label duly stamped with the duty charged thereon. The schedule to the Act contains, so far as material, an exemption in the case of mixtures, compositions, or preparations which shall be vended by any surgeon, apothecary, chemist, or druggist "who hath served a regular apprenticeship":—

Held, that in order to constitute a "regular apprenticeship" within the above exemption there must be an apprenticeship under a contract in writing, and that therefore the exemption does not apply where there has been service in fact as an apprentice under an oral contract.

CASE stated by the stipendiary magistrate and two justices of the peace in and for the city of Bradford.

An information was preferred by the appellant, one of His Majesty's officers of Customs and Excise, under s. 2 of the Medicines Stamp Act, 1812, against the respondent, a chemist carrying on business at Bradford, for that he, the respondent, on

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February 12, 1909, did utter, vend, and expose to sale a bottle containing a certain preparation and composition to be used and applied as a medicine and medicament for the prevention, cure, and relief of disorders and complaints incident to and affecting the human body and liable to stamp duty chargeable in respect of medicines under the statutes in that case made and provided, to wit, "blood purifier," without a paper cover, wrapper, and label, provided by the Commissioners of Inland Revenue and duly stamped for denoting the duty charged on such bottle, being properly and sufficiently pasted, stuck, fastened, and affixed thereto.

The question raised upon the hearing was whether or not the respondent came within the terms of one of the special exemptions contained in the schedule to the Medicines Stamp Act, 1812. Sect. 2 of that Act imposes a penalty upon any person who shall utter, vend, or expose to sale any packet, box, bottle, pot, phial, or other inclosure containing any of the drugs, preparations, or compositions set forth in the schedule thereto without a paper cover, wrapper, or label, provided and supplied by the Commissioners of Stamps and duly stamped for denoting the duty charged thereon (1), being properly and sufficiently pasted, stuck, fastened, or affixed thereto so that such packet, &c., cannot be opened without tearing such stamped cover, wrapper, or label. The schedule to the Act contains certain special exemptions, the material one being as follows: "And also all mixtures, compositions, or preparations whatsoever . . . . which shall be uttered or vended by any such surgeon, apothecary, chemist, or druggist as aforesaid"; the words "as aforesaid" referring to the following words in a preceding exemption, "who hath served a regular apprenticeship."

Upon the hearing the following facts were proved:—The respondent on February 12, 1909, sold a shilling bottle of a preparation called "blood purifier" at his shop at Bradford, the bottle being without the stamp required by the Medicines Stamp Act, 1812. The father of the respondent was a registered chemist, and nineteen years ago the respondent, in pursuance of an oral agreement

(1) The amount of the duty is specified in Sched. B to the Stamp Act, 1804 (44 Geo. 3, c. 98).

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with his father, became his apprentice, and as such duly served him and was instructed by him for four years, then becoming his paid assistant, and ultimately succeeding to his business.

It was contended on behalf of the appellant that, by reason of there having been no agreement in writing between the respondent and his father, the respondent had not within the meaning of the above-mentioned exemption "served a regular apprenticeship," because to constitute an apprenticeship in law there must be an agreement in writing, inasmuch as the agreement was one not to be performed within one year from the making thereof within the meaning of s. 4 of the Statute of Frauds (29 Car. 2, c. 3).

The magistrates were of opinion (1.) that the words "served a regular apprenticeship" were satisfied by service in fact as an apprentice under an oral agreement, and that the respondent had duly served in fact as an apprentice under such an agreement; (2.) that there was not sufficient evidence to shew that the agreement was one not to be performed within a year; (3.) that the respondent was within the exemption and had committed no offence. The magistrates accordingly dismissed the information.

The question for the opinion of the Court was whether the magistrates came to a correct determination in point of law.

Sir S. T. Evans, S.-G. (*F. F. Daldy* with him), for the appellant. It is admitted that this preparation is covered by the Medicines Stamp Act, 1812, unless the respondent comes within the exemption in the schedule to the Act. The first question is whether, in order to constitute a "regular apprenticeship" within the meaning of the exemption in the schedule, the contract of apprenticeship must be contained in an instrument in writing. Under the Act 5 Eliz. c. 4 an indenture of apprenticeship was necessary, and the apprenticeship must have been for seven years at the least: Chitty on Apprentices, ed. 1812, pp. 26, 27, 28. In *Ex parte Davis* (1) it was assumed that an indenture was necessary. The Apprentices Act, 1814 (54 Geo. 3, c. 96) repealed the provision of the Act of Elizabeth which made

(1) (1794) 5 T. R. 715.

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it necessary that an apprenticeship should last for seven years, and provided that "indentures, deeds, and agreements in writing" which would be otherwise valid and effectual shall be valid and effectual in law. That statute is generally understood to have rendered a deed unnecessary, but it still required that there should be an agreement in writing to constitute a binding contract of apprenticeship: 1 Petersdorff's Abridgment, ed. 1861, p. 397, where it is said that "though 54 Geo. 3, c. 96, has now dispensed with the formality (of a deed indented), still even under it a writing is required, and a mere parol binding would not constitute an apprenticeship." The various Stamp Acts which have from time to time been passed bear out this view. The Act 8 Anne, c. 9, ss. 32, 35, imposed a duty upon the sum agreed to be paid in respect of any apprentice, and required such sum to be truly inserted in some indenture or other writing relating to the service of such apprentice. Under the Stamp Act, 1870 (33 & 34 Vict. c. 97), by the combined effect of ss. 39 and 40, and the schedule, "Apprenticeship," every instrument (which by s. 2 means every written document) of apprenticeship, whether there is a premium payable or not, must be stamped. That enactment proceeded upon the footing that a contract of apprenticeship had to be stamped, and for the purpose of collecting the duty it was required to be in writing. Those Acts, though now repealed, shew what was the intention of the Legislature. The present Stamp Act, 1891, in no way affects that inference. Again, the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), ss. 5, 6, gives a Court of summary jurisdiction the same power to hear and determine a dispute between a master and his apprentice as if the dispute were between an employer and a workman and as if the "instrument of apprenticeship" were a contract between an employer and a workman. That Act assumes that the contract of apprenticeship must be by an instrument in writing. The Act only applies to the smaller cases of apprenticeship where the premium paid does not exceed 25*l.* (see s. 12), and if there could be contracts of apprenticeship by parol, the Legislature would certainly have brought those contracts within the Act as belonging necessarily to the smaller class of cases. Lastly, there are the

cases relating to pauper settlement. In *Rex* v. *Inhabitants of Kingsweare* (1) and *Rex* v. *Inhabitants of Margram* (2) it was held that service as an apprentice, there being no indenture of apprenticeship, did not confer a settlement. To the same effect is *Rex* v. *Inhabitants of Cromford.* (3) The Poor Relief Act, 1691 (3 W. & M. c. 11), s. 8, only conferred a settlement where the contract of apprenticeship was by indenture; and the Apprentices (Settlement) Act, 1757 (31 Geo. 2, c. 11), s. 1, amended this last Act by providing that no person who shall be bound an apprentice by any deed, writing, or contract, not indented, being first legally stamped, shall be liable to be removed from the parish where he shall have been so bound an apprentice and resident forty days. A contract of apprenticeship in writing is now sufficient: *Woodstock Union* v. *Shipton-on-Stour Guardians.* (4) The result is that to constitute an apprenticeship which is enforceable at law, and which therefore comes within the words "a regular apprenticeship" in the exemption contained in the schedule to the Medicines Stamp Act, 1812, the contract must be in writing. It is reasonable that the law should require the contract to be in writing, because apprentices are in the main infants, and for their protection it is desirable to have their rights and obligations clearly defined in writing.

Secondly, with regard to the Statute of Frauds, the case states in effect that the apprenticeship was for four years, and it is difficult to see how that was not an agreement which was not to be performed within one year from the making thereof.

The respondent did not appear.

LORD ALVERSTONE C.J. We are in the somewhat unfortunate position of having heard no argument on behalf of the respondent, and for that reason we have heard a very full argument on the part of the appellant. An information was preferred against the respondent for selling a bottle containing a certain preparation called "blood purifier," which ought to have been stamped under the Medicines Stamp Act, 1812, unless the respondent comes within the protection of the exemption in

(1) (1776) Burr. Sett. Cas. 839.
(2) (1793) 5 T. R. 153.
(3) (1806) 8 East, 25.
(4) (1892) 62 L. J. (M.C.) 43.

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the schedule to that Act. The exemption covers "all mixtures, compositions, or preparations whatsoever . . . . which shall be uttered or vended by any such surgeon, apothecary, chemist, or druggist as aforesaid," that is to say, any surgeon, apothecary, chemist, or druggist "who hath served a regular apprenticeship." The respondent was a chemist who succeeded to his father's business, and it must be taken that he had in fact served his father as an apprentice and had gone through a course of instruction for four years, and had become competent to assist his father in his business and ultimately to take the business over. But though that is so, in my opinion he does not bring himself within the exemption. To my mind the exemption must be construed strictly, and the words "a regular apprenticeship" mean a formal contract of apprenticeship which can be enforced at law. I am satisfied from the argument which we have heard that, except where some statute may have otherwise provided in any particular case, the only relaxation of the old law as stated in the Act 5 Eliz. c. 4 has been that a contract of apprenticeship need not be under seal, but may be in writing under hand. The settlement cases to which we have been referred, which shew that in order to acquire a settlement by apprenticeship the contract of apprenticeship must formerly have been under seal, and may now be in writing, are extremely strong in support of the appellant's contention, because I should have thought that, unless the law required a contract of apprenticeship to be in writing, a person who had in fact served as an apprentice under an oral agreement would have acquired a settlement by apprenticeship. The Courts, however, have decided in a series of cases that no settlement can be acquired by service under a parol agreement of apprenticeship. When it is remembered that the Medicines Stamp Act, 1812, was passed to afford a protection to the public against having medicines and medicinal preparations sold to them by unskilled persons, the words "who hath served a regular apprenticeship" should be construed strictly, and are, in my view, intended to indicate a contract of apprenticeship which is enforceable at law both against the servant and against the master. For these reasons I am of opinion that the magistrates ought not

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to have acted upon the view that because the respondent had served as an apprentice under an oral agreement he came within the exemption in the schedule to the Act.

The second point, that which relates to the Statute of Frauds, does not arise, inasmuch as there must be a contract in writing to constitute a regular apprenticeship and we decide the case on that broader ground; but I may observe that if the point had arisen, it is difficult to see how upon the facts which are stated in the case the magistrates can properly have come to the conclusion that there is not sufficient evidence to shew that the agreement was one not to be performed within a year from the making thereof. The appeal must be allowed, and the case must be remitted to the magistrates to convict.

PHILLIMORE and BUCKNILL JJ. agreed.

Appeal allowed.

Solicitor for appellant: *Solicitor of Customs and Excise.*

W. F. B.

Followed. WRIGHT *v.* BENNETT. [1948] 1 K. B. 601

Applied. WRIGHT *v.* BENNETT. [1948] 1 All E.R. 410.

[IN THE COURT OF APPEAL.]

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Feb. 17, 18.

MASSON, TEMPLIER & CO. *v.* DE FRIES; DE FRIES, CLAIMANT.

Practice—Costs—Taxation—Appeal, Costs of—Documents—Copies used in prior Proceeding—Costs not incurred for Purposes of Appeal.

Upon interpleader proceedings in the county court with regard to the title to goods taken in execution the claimant succeeded. The county court judge gave the judgment creditors leave to appeal to the Divisional Court upon condition that, if successful, they should not ask for costs of the appeal. The judgment creditors appealed to the Divisional Court. Copies of certain documents, which were necessary for the use of counsel and the judges upon the appeal to the Divisional Court, were provided by the judgment creditors. The Divisional Court dismissed the appeal. The judgment creditors obtained from the Court of Appeal leave to appeal from the decision of the Divisional Court, and did so appeal. The before-mentioned copies of documents were necessary, and were used for the purposes of that appeal. That appeal was successful, and the claimant was ordered to pay to the judgment creditors the costs of

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and incident to the appeal. The bill of costs delivered by the judgment creditors to the claimant included items in respect of the before-mentioned copies of documents, which upon taxation the Master disallowed:—

Held, that these items were rightly disallowed by the Master as not representing costs incurred for the purposes of the appeal to the Court of Appeal.

APPEAL from an order of A. T. Lawrence J. at chambers refusing to review the taxation of a bill of costs by a Master.

An action for goods sold was brought by the appellants, Messrs. Masson, Templier & Co., in the Brompton (now West London) County Court, against one Mrs. De Fries and her husband. Judgment was obtained therein by the appellants against the wife alone; and, execution having been issued upon the judgment, certain goods were seized thereunder. The husband claimed these goods as belonging to him. Interpleader proceedings were thereupon taken in the county court to try the question of the ownership of the goods, upon which the claimant succeeded. The county court judge gave the judgment creditors leave to appeal to the Divisional Court on condition that they should not, if successful, ask for any costs of the appeal. The judgment creditors appealed to the Divisional Court, but their appeal was dismissed. Copies of certain documents, which were necessary for the use of counsel and the judges upon the appeal to the Divisional Court, were provided by the judgment creditors. The judgment creditors obtained from the Court of Appeal leave to appeal from the decision of the Divisional Court. On the hearing in the Court of Appeal the appeal of the judgment creditors was allowed, and it was ordered that judgment in the interpleader proceedings should be entered for them, and that "the claimant do pay to the judgment creditors or their solicitors the costs of and incident to the appeal to this Court and the costs of and incident to the interpleader proceedings in the Brompton (now West London) County Court, such costs to be taxed." (1) The before-mentioned copies of documents were necessary, and were used for the purposes of the appeal to the Court of Appeal. The bill of costs in that appeal

(1) The case on appeal is reported [1909] 2 K. B. 831.

delivered to the claimant by the judgment creditors contained items in respect of these copies of documents, which on taxation were disallowed by the Master. The judgment creditors applied to A. T. Lawrence J. at chambers for a review of the Master's taxation in respect to these documents, but he refused their application. (1)

J. D. Crawford (*J. R. Atkin, K.C.*, with him), for the judgment creditors. The disallowance by the taxing Master of the costs of these copies of documents, which were necessary for the hearing of the appeal in this Court, was wrong in point of principle. The successful party in an appeal cannot, it is true, be allowed the costs of such documents twice over. If he has already got the costs of the documents in the Court below, he cannot get them again; but it is submitted that, if the successful party in an appeal has not already been recouped the costs of the necessary copies of documents on the proceedings in the Court below, it would be unjust, if those copies were necessary for the purposes of the appeal, that he should not be allowed them as costs of the appeal. Suppose, by way of illustration, that copies of documents were necessary for the purposes of an application by a plaintiff under Order XIV. and were supplied by him, and that the plaintiff failed in that application, but subsequently succeeded on the trial of the action, for the purposes of which likewise those copies of documents were necessary and were used; it is submitted that in such a case he ought to be allowed the costs of those copies as costs of the action. [He cited *Warner* v. *Mosses*. (2)]

Samuel Moses, for the claimant. The only costs which have been disallowed by the Master are costs of copies of documents, which came into existence before the appeal to this Court, for the purposes of the appeal to the Divisional Court, for the conduct of which they were absolutely necessary. They are costs really

(1) The judgment creditors were represented by a junior counsel only in the Divisional Court. In the Court of Appeal they took in a leader. The costs of copies of documents made for his use were allowed. The disallowance was in respect of the copies which were made for the purposes of the appeal to the Divisional Court.

(2) (1881) 19 Ch. D. 72.

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of the appeal to the Divisional Court, which the judgment creditors are bound not to ask for by the condition upon which the county court judge granted them leave to appeal to the Divisional Court. If a document is used in the Court below, and the cost of it has been allowed there, or if it has been so used under such circumstances that the cost of it could not be claimed in the Court below, then it cannot be charged for in the Court above on the ground that it has been used there.

J. D. Crawford, for the judgment creditors, in reply.

VAUGHAN WILLIAMS L.J. We have to construe the order made by the Court of Appeal with regard to the costs in this case, and, having done so, to give effect to it in respect to the taxation of those costs in accordance with the practice which prevails upon the taxation of such costs. The order is that "the claimant do pay to the judgment creditors or their solicitors the costs of and incident to the appeal to this Court, and the costs of and incident to the interpleader proceedings in the Brompton (now West London) County Court, such costs to be taxed." The order says nothing with regard to the costs of the appeal to the Divisional Court. That is in consequence of the condition, imposed by the county court judge on giving leave to appeal, that the judgment creditors, if successful in that appeal, should not ask for costs. All I have to observe with regard to the construction of the order, so far as that is material to the present case, is that there is nothing in it which in any way affects or alters the ordinary meaning of the words "costs of and incident to the appeal to this Court." That being so, the question is, what, according to the practice on taxation, would be covered by those words? In a bill of costs the successful party, to whom costs have been awarded, claims from his opponent recoupment in respect of the disbursements which he has made for the purposes of the proceeding in which he has succeeded. It is the fact, no doubt, that these documents, in respect of which costs are now claimed, were used on the hearing of the appeal to this Court, and the proceedings here could not have been carried through without the use of them. But, as I understand, according to the practice on taxation, no disbursements are allowed but such as have been

actually made for the purposes of the proceeding in respect of which the order for costs was made. The truth is that the documents here in question came into existence for the purposes of the appeal to the Divisional Court, and no fresh disbursement was necessary in order that they might be used in the Court of Appeal. Under these circumstances I do not think that there can be allowed on taxation of the costs of the appeal in this case charges in respect of these documents, in relation to which there has been no fresh disbursement. It does not seem to me to make any difference that by reason of the order of the county court judge the appellants would, if successful, have been debarred from claiming the costs of these documents on the appeal to the Divisional Court. I think that this appeal must be dismissed.

FARWELL L.J. I understand it to be the settled practice in the taxing office not to allow as costs of a proceeding costs of documents used on a prior proceeding. There is nothing special in the words of the order for costs in this case to prevent the application of that practice, and we are therefore precluded from interfering with the taxation of the Master.

Appeal dismissed.

Solicitors for judgment creditors: *Cohen & Cohen.*
Solicitor for claimant: *John Hands.*

E. L.

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[IN THE COURT OF APPEAL.]

ADMIRAL FISHING COMPANY *v.* ROBINSON.

Employer and Workman — Compensation — Fisherman—Share in Profits — Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 7, *sub-s.* 2.

A claimant under the Workmen's Compensation Act, 1906, was employed as engineer upon a steam fishing boat and was paid by a share in the profits with a guarantee from the owners that his share in the profits should never be less than 30*s.* a week :—

Held, that he was remunerated by a share in the profits within the meaning of s. 7, sub-s. 2, of the Act, and was therefore excepted from the Act and not entitled to compensation.

Appeal from an award of the county court judge for Lowestoft under the Workmen's Compensation Act.

The appellants, the Admiral Fishing Company, had applied to the county court judge to fix the amount of compensation, if any, payable to the respondent Robinson, who had been disabled by an accident when working as engineer upon their fishing vessel *Rook*. The *Rook* was a steam drifter fishing boat. All the crew were paid by shares in the adventure, but, according to what was said to be the custom in the fishing trade, Robinson as engineer had a guarantee from the owners that his share should not be less than 30*s.* a week—i.e., he was paid a fixed wage of 30*s.* a week, and if at the end of the voyage his share in the profits came to more than 30*s.* a week he was paid the difference; if to less, nothing was deducted. The only question to be decided in the case was whether Robinson came within the exception created by s. 7, sub-s. 2, of the Workmen's Compensation Act, 1906, which runs: "This Act shall not apply to such members of the crew of a fishing vessel as are remunerated by shares in the profits or the gross earnings of the working of such vessel."

The owners had for some weeks after the accident paid Robinson 19*s.* a week, being half wages calculated on the basis of 30*s.* wages and 8*s.* estimated value of food supplied. When the incapacity of Robinson became permanent, and the question whether a lump sum should be paid to him for compensation

was raised, they made the present application. The county court judge held that Robinson was within the Act.

A. Neilson and *W. Stewart*, for the appellants. The respondent was remunerated by a share in the profits within the meaning of the Act. It makes no difference that he received a share or 30*s.* a week, whichever was the larger. That arrangement is merely a guarantee of the amount of his share. *Whelan* v. *Great Northern Steam Shipping Co.* (1) and *Gill* v. *Aberdeen Trawling and Fishing Co.* (2) shew that the Courts will not fritter away the exception by small distinctions. In the ship's accounts the man is treated as a share hand like the others.

A. Cairns, for the respondent. The real position of the engineer is that he was paid a fixed wage with an additional bonus if the voyage was prosperous. A sailor paid by a share of profits is not a partner: *Wilkinson* v. *Fraser*. (3) The Scotch case was decided on the ground that if there were no profits the fisherman in that case would get nothing. The arrangement as to engineers was made because they in a body refused to go upon any voyage without fixed weekly wages.

COZENS-HARDY M.R. This is a very short point. There are a certain class of seamen included in the Act, and there are a certain class of members of a crew who are in terms excluded. Sect. 7, sub-s. 2, says: "This Act shall not apply to such members of the crew of a fishing vessel as are remunerated by shares in the profits or the gross earnings of the working of such vessel." Now the man here was the engineer of a fishing smack, and was as such entitled to one share of the net profits of the working of the vessel on the particular voyage. The other shares were divided into so many for boat and tackle, so many to one man, and so many to another. The engineer had one share with this addition, that if his share when the voyage was over did not amount to 30*s.* a week the owners of the vessel guaranteed that the share should amount to 30*s.*, or, in other words, guaranteed the amount necessary to make up 30*s.* a week. That was one of

(1) [1909] W. N. 135; 78 L. J. (K.B.) 860.
(2) (1908) S. C. 328.
(3) (1803) 4 Esp. 182.

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the expenses of the voyage which would have to be deducted before the profits were ascertained. The learned county court judge has taken the view that the word "solely" ought to be read into the section, and that it does not apply to any members of the crew unless you can say that they are remunerated solely by shares in the profits. I am unable to accept that view. I see no reason whatever why a man who has a share in the profits should not also have, from other persons who are interested in the venture, a guarantee that the share will amount to a certain sum. That is the present case, and in my opinion the learned judge was wrong in his view that this man was entitled to the benefit of the Act. In my opinion the appeal must be allowed.

FLETCHER MOULTON L.J. I am of the same opinion.

BUCKLEY L.J. In this case the whole question is whether the respondent was remunerated by a share in the profits of the vessel. I answer that question in the affirmative. In every event he was entitled to a share, and in certain events to more than a share. The judge in substance reads into the Act the word "solely." But to construe the Act in that way renders it impossible to work it, for a man is seldom if ever remunerated solely by a share. He gets his bunk on board ship, as a rule, he gets his food and other incidentals. If he is remunerated by a share he is a share hand fisherman, and none the less because there is a guarantee that if his share does not amount to a certain sum he shall receive more.

Appeal allowed.

Solicitors: *Holman, Birdwood & Co., for Chamberlin & Talbot, Yarmouth; W. H. Cowl, for A. E. Cowl, Yarmouth.*

J. R. B.

[IN THE COURT OF APPEAL.]

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Feb. 11, 15, 26.

SIMMONS *v.* HEATH LAUNDRY COMPANY.

Employer and Workman—Compensation—Basis of Assessment—Concurrent Employment—Professional Services—"Workman"—"Contract of Service"—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 13; *Sched. I., par.* 1 (*b*), *par.* 2 (*b*).

A laundry girl, aged nineteen, had her hand injured by an accident arising out of and in the course of her employment. She earned 7*s.* a week at the laundry and she also gave piano lessons to a man's children at his house at 3*s.* a week. She applied under the Workmen's Compensation Act, 1906, that the latter sum might be taken into account under par. 2 (*b*) of the First Schedule in assessing the amount of compensation. The county court judge held that as teacher of music she did not come within the definition of workman in the Act and awarded her 7*s.* a week compensation in accordance with par. 1 (*b*), proviso (*b*), of the First Schedule:—

Held, that the question whether an applicant in any particular case was a workman within the Act was a question of fact and that there was evidence to support the finding of the county court judge.

The meaning of "contract of service" discussed.

APPEAL from an award of the judge of the Bloomsbury County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The applicant, a girl aged nineteen, was employed in the respondents' laundry as a skirt machine hand. On June 14, 1908, while she was working at this machine, her left hand was crushed between two hot rollers and rendered practically useless. She was earning 7*s.* a week at the laundry, and the respondents had since paid her that sum as compensation in accordance with par. 1 (*b*), proviso (*b*), of the First Schedule to the Act.(1) In addition to this 7*s.* she earned a few shillings a week by giving music lessons and playing accompaniments on the piano, and

(1) Sched. I., par. 1 (*b*), provides that the amount of compensation under the Act shall be where total or partial incapacity results from the injury a weekly payment during the incapacity not exceeding fifty per cent. of the workman's average weekly earnings during the previous twelve months:

"Provided that—

. . . .

"(*b*) as respects the weekly payments during total incapacity of a workman who is under

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she applied that these earnings might be taken into account, in accordance with the provisions of par. 2 (*b*) of the First Schedule, in assessing the amount of compensation, and that she might be awarded 10*s*. a week compensation, the maximum amount allowed by par. 1 (*b*), proviso (*b*), of the schedule.

It appeared that the applicant for a year and a half before the date of the accident gave piano lessons to the children of a Mr. Flack at his house at 3*s*. a week, and that she also gave lessons to Lizzie Riley, a domestic servant, at 1*s*. a lesson, and to Daisy Love, aged fourteen, at 6*d*. a lesson. She also accompanied a Mr. Duke at concerts given at a public-house nearly every week during six months of the year at pigeon fancying meetings, and for this she received 5*s*. a night.

The respondents objected that in respect of these earnings the applicant was not a workman within the meaning of the Act and relied upon *Bagnall* v. *Levinstein, Ld.* (1)

The county court judge accepted this view and made an award for the applicant of 7*s*. a week only.

The applicant appealed.

Atkin, K.C., and *Gutteridge*, for the appellant. A laundry girl ekes out the 7*s*. a week she earns at the laundry by giving music lessons to children at their mother's house at 3*s*. a week. It is submitted that qua music mistress she was under a contract of service, and in this connection it is important to observe that the applicant belonged to the

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twenty-one years of age at the date of the injury, and whose average weekly earnings are less than twenty shillings, one hundred per cent. shall be substituted for fifty per cent. of his average weekly earnings, but the weekly payment shall in no case exceed ten shillings."

Paragraph 2 (*b*) provides:

"Where the workman had entered into concurrent contracts of service with two or more employers under which he worked at one time for one such employer and at another time for another such employer, his average weekly earnings shall be computed as if his earnings under all such contracts were earnings in the employment of the employer for whom he was working at the time of the accident;"

(1) [1907] 1 K. B. 531.

class of workmen and not to the professional classes and that the lessons were given at her employer's house. The question is whether this contract to teach music was a contract to render services or a contract for the display of special attainments. The case is not the same as if she were a skilled musician receiving pupils at her own house. A board school teacher or an usher at a private school would be entitled to the benefits of the Act. The county court judge proceeded upon *Bagnall* v. *Levinstein, Ld.* (1), but that was decided under the Act of 1897, where the test was different, and would have been decided the other way under the existing Act. In *Burr* v. *Theatre Royal, Drury Lane, Ld.* (2) the plaintiff, a chorus singer, was held to be in the employment of the defendants for the purpose of the doctrine of common employment, and in *Walker* v. *Crystal Palace Football Club, Ld.* (3), which is closely in point, a professional football player was held to be a workman within the meaning of the Act of 1906. Here, as in that case, the applicant, in giving music lessons, was bound to obey the general instructions of her employer, although she had a certain discretion in the mode of carrying out those instructions.

[FLETCHER MOULTON L.J. referred to *Dewhurst* v. *Mather*. (4)]

The judge did not proceed upon the labour being casual.

Simon, K.C., and *Shakespeare*, for the respondents. Under the existing Act a workman is defined as any person who has entered into or works under a contract of service or apprenticeship with an employer. In order that the applicant may come within the Act she must be equally within it if she did no laundry work at all; that is to say, for the purposes of concurrent employment the applicant must shew a contract of service in the same way as if that were the only employment. "Contract of service" involves the relationship of master and servant, and in determining whether the applicant is a workman the test is substantially the same as that laid down by Crompton J. in *Sadler* v. *Henlock* (5), where the question was

(1) [1907] 1 K. B. 531.
(2) [1907] 1 K. B. 544.
(3) Ante, p. 87.
(4) [1908] 2 K. B. 754.
(5) (1855) 4 E. & B. 570; 24 L. J. (Q.B.) 138.

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as to the application of the maxim respondeat superior, namely, whether the employer has control over the person employed. That is the test which has been adopted by the leading text-writers on these Acts: Ruegg, Employers' Liability and Workmen's Compensation, 7th ed. p. 234; Parsons and Allen's Workmen's Compensation Act, 1906, 3rd ed. p. 84.

[COZENS-HARDY M.R. In *Walker* v. *Crystal Palace Football Club, Ld.* (1) we held that it was sufficient to bring a man within the Act if he had contracted to obey the general instructions of the employer.]

In that case for all the time when the man was not actually playing he was bound to obey the most minute directions of his trainer. Accepting the test to be extracted from that case, this case does not fall within it.

[BUCKLEY L.J. referred to the definition of the relationship of master and servant in Pollock's Law of Torts, 8th ed. p. 79.]

The cases under the Act of 1897 have no direct bearing on the point at issue, since the definition of "workman" in that Act was different, but they illustrate the manner in which this question has been approached by the Court. *Vamplew* v. *Parkgate Iron and Steel Co., Ld.* (2) shews that a clear distinction was drawn between a workman who has to obey orders and a contractor who has to produce a certain result; *Simpson* v. *Ebbw Vale Steel, Iron, and Coal Co.* (3) shews that the term "workman" must be construed in its ordinary popular sense; and *Bagnall* v. *Levinstein, Ld.* (4) reaffirms that position. It may be conceded that that case might very well have been decided differently under the new Act, but the applicant would not have been within the new Act if he had been acting as teacher. The difference between the definitions in the two Acts is pointed out in Parsons and Allen's Workmen's Compensation Act, 1906, and is illustrated by *Morgan* v. *London General Omnibus Co.* (5) It is not every one who renders service who is a servant. Thus a cab-driver is not the servant of his fare, though he renders him service, and in *Jones* v. *Liverpool Corporation* (6) the driver of a water-cart who was hired by a

(1) Ante, p. 87.
(2) [1903] 1 K. B. 851.
(3) [1905] 1 K. B. 453.
(4) [1907] 1 K. B. 531.
(5) (1884) 13 Q. B. D. 832.
(6) (1885) 14 Q. B. D. 890.

corporation to water the streets and was told what streets to water was held not to be the servant of the corporation. So it is submitted a piano teacher is not the servant of his pupils. The Act itself contains many indications of the kind of employment to which the words "contract of service" are limited: see particularly the provisions as to the payment of compensation by weekly payments, the limitations on the amount and rate of compensation, the limit of income necessary to entitle the applicant to compensation, and the application of the Act to industrial diseases. The workman is treated by the Legislature as being in a position of dependence on the employer and in fact as a kind of animated machine. In so far as this question is a question of fact the decision of the county court judge cannot be disturbed, and in so far as it is a question of law there is no ground for saying that he has misdirected himself.

Atkin, K.C., in reply.

Cur. adv. vult.

Feb. 26. COZENS-HARDY M.R. This appeal raises a question as to the meaning of the term "contract of service" in the Workmen's Compensation Act. It arises in this way. The appellant is a young woman under twenty-one who met with an accident while working for the respondents, a laundry company. Liability was admitted on the footing of the wages (7*s.* a week) paid by the respondents. But the appellant is a pianist and has supplemented her earnings in a praiseworthy manner by giving lessons to a neighbour's children, in respect of which she received 3*s.* a week. There were other smaller and more irregular payments, but it is sufficient to deal with this instance, which is the most favourable to the appellant. It is alleged that the case falls within par. 2 (*b*) of the First Schedule, and that the appellant "had entered into concurrent contracts of service with two or more employers." The county court judge did not accept this argument and made an award in favour of the appellant of 7*s.* a week only.

I confess my inability to lay down any complete or satisfactory definition of the term "contract of service." Various tests were suggested by counsel, no one of which was beyond criticism.

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Some light is thrown by the definition of "workman" in s. 13 of the Act, for the Act applies only to workmen. The material words are these: "'Workman' . . . . means any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work, or otherwise, and whether the contract is expressed or implied, is oral or in writing." I am far from saying that a teacher may not be within the Act, the words "or otherwise" being sufficient to cover such a case. An usher in a private school, or a teacher in a provided or non-provided school, or a nursery governess would, under ordinary circumstances, be entitled to claim the benefit of the Act. On the other hand it would, I think, be absurd to hold that a skilled music master who gives lessons to a pupil, either in his own house or in the pupil's house, is to be regarded as the "workman" and the pupil as the "employer." In such a case there may be a contract for services, but there is not a contract of service. In any particular case it will be for the arbitrator, after considering all the circumstances, to decide whether the injured professional person is or is not a "workman." This is not a question of law, but a question of fact, and, unless the arbitrator has misdirected himself, this Court ought not to interfere.

In the present case his Honour Judge Bacon held that the appellant was not a "workman" within the meaning of this Act, and I see no reason to suppose he misdirected himself. The appeal must be dismissed with costs.

FLETCHER MOULTON L.J. In this case the appellant is Daisy Simmons, an infant who worked as a laundry hand in the employment of the defendant company. It is admitted that on June 14, 1908, she met with an accident in the course of and arising out of her employment whereby her left hand was seriously damaged, and the sole question before the county court judge was the amount of weekly earnings in respect of which she was entitled to compensation. Her wages at the laundry were 7*s*. a week, but as she was able to play the piano she added to these earnings by giving music lessons, in one case receiving 3*s*. a week for teaching the children of a Mr. Flack, and in two

other cases giving lessons once a week at 1*s.* and 6*d.* per lesson respectively. On behalf of the applicant it was contended that these additional earnings must be allowed for in the compensation by reason of the provisions of Sched. I., par. 2 (*b*), which provides as follows: [The Lord Justice read the clause, and continued.] The county court judge held that the arrangements under which the music lessons were given were not contracts of service and accordingly awarded 7*s.* a week only as compensation.

These facts, although very simple, raise a question of law of considerable importance and difficulty. It turns substantially on the scope which is to be given to the phrase "contract of service" in the Act. It is true that as a matter of law it is not every contract of service that constitutes a person a workman under the Act, since under the definition clause it must be "a contract of service or apprenticeship with an employer whether by way of manual labour, clerical work, or otherwise." But I do not feel called upon to limit the generality of the word "otherwise" in such a way as to exclude all contracts in respect of teaching. On the contrary I am satisfied that many contracts for the services of teachers bring them within the Act. It is therefore necessary to consider what contracts for teaching are and what are not within the scope of the Act.

Some cases present no difficulty. For example, where the proprietor of a private boarding school engages ushers to teach the boys and to maintain discipline, it does not, in my opinion, admit of reasonable doubt that the contracts into which those ushers enter are "contracts of service" within the Act. On the other hand it is in my mind equally clear that where a person goes to a music or singing master to take lessons it would be absurd to hold that the person giving the lessons is the servant of the person taking them in any sense of the word. The contract between them is a contract for services, but it is not a contract of service. Between these two extreme cases lie an infinite number of intermediate cases where the special circumstances point with greater or less force towards the one conclusion or the other, and in my opinion it is impossible to lay down any rule of law distinguishing the one from the other. It is a question of fact to be decided by all the circumstances of the case. The

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greater the amount of direct control exercised over the person rendering the services by the person contracting for them the stronger the grounds for holding it to be a contract of service, and similarly the greater the degree of independence of such control the greater the probability that the services rendered are of the nature of professional services and that the contract is not one of service. The place where the services are rendered, i.e., whether at the residence of the person rendering the services or not, will also be an element in deciding the case, but is not in my opinion decisive, nor is the question whether the services are rendered to a person in the way of business or to a parent in respect of his children.

In the present case there are no facts before the Court except that these music lessons were given with a certain degree of regularity, and that the price was in some cases calculated at so much per lesson, but in one case at so much per week, no doubt for a fixed number of lessons. These facts are certainly not sufficient to shew negatively that the contract was not a contract for professional services or affirmatively that it was a contract of service. The learned county court judge has decided that it was not a contract of service, and that therefore the earnings under it cannot be counted in assessing the compensation to be paid to the injured girl. This is a question of fact as to which we cannot interfere with his decision. Indeed I think that on the materials before him he was not only justified in coming to such a decision, but was compelled so to do, because the onus was upon the applicant and she had failed to discharge it.

I am therefore of opinion that this appeal must be dismissed with costs.

BUCKLEY L.J. This appeal involves a decision trifling in pecuniary amount, but of the largest consequence in its possible application to other cases. The question in substance is as to the true meaning of the words "contract of service" in the definition of a workman contained in s. 13 of the Act. Upon a review of the Act of 1897 Collins M.R. in *Simpson* v. *Ebbw Vale Steel, Iron, and Coal Co.* (1) gave detailed reasons shewing that

(1) [1905] 1 K. B. 453.

the scope of that Act was confined to persons who would in the language of an ordinary person be described by the word "workman." The Act of 1897 contained in s. 7 a clause defining workman as "including" certain persons. The Act of 1906 differs in that it defines workman as "meaning" certain persons. Under these circumstances the reasoning in *Simpson* v. *Ebbw Vale Steel, Iron, and Coal Co.* (1) is not strictly applicable to this case. But I think it is instructive because the question under the present Act as to the meaning of the words "contract of service" may be again whether those words do not in this Act import that which an ordinary person would understand by a contract of service.

It is not to every employment that the Act applies. It is confined to employments of which it can be predicated that in the employment there is employed a workman (see s. 1, sub-s. 1), and there exist in this Act the same indications as were pointed to in *Simpson* v. *Ebbw Vale Steel, Iron, and Coal Co.* (1) as leading to the conclusion which Collins M.R. described thus: "The Act presupposes a position of dependence; it treats the class of workman as being in a sense 'inopes consilii,' and the Legislature does for them what they cannot do for themselves; it gives them a sort of State insurance, it being assumed that they are either not sufficiently intelligent or not sufficiently in funds to insure themselves. In no sense can such a principle extend to those who are earning good salaries. It is of course very difficult to draw the exact line, but it is easy in a particular case to say on which side of the line it falls." I quite agree, except that I respectfully demur to the last proposition—I do not find it easy. The persons contemplated by the Act are such as that they are spoken of as earning weekly wages; the weekly payment by way of compensation is not to exceed 50 per cent. of the average weekly earnings and not in any case to exceed 1*l.* In case of death the compensation is not to exceed 300*l.* The parties to the contract are spoken of as employer and workman and the contract between them is spoken of as a contract of service. It is not, of course, every contract under which services are rendered that can be described as a

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contract of service. If I take a railway ticket the company enters into a contract with me to render me service, but there is no contract of service and the railway company is not my servant. A contract of service is one which necessarily involves the existence of a servant, and the parties contemplated by this Act may be called, I think, either employer and workman or master and servant, but subject to the limitation that the servant must be one who falls within the definition of workman as contained in s. 13. "A servant," said Bramwell L.J. in *Yewens* v. *Noakes* (1), "is a person subject to the command of his master as to the manner in which he shall do his work." To distinguish between an independent contractor and a servant the test is, says Crompton J. in *Sadler* v. *Henlock* (2), whether the employer retains the power of controlling the work. Sir Frederick Pollock in his book on Torts, p. 79, says "the relation of master and servant exists only between persons of whom the one has the order and control of the work done by the other." This definition I think requires some qualification. Suppose that a motor car can lawfully be driven only by a person who holds a certain licence and is thereby bound to conform to certain public regulations. The driver may be the servant of the owner of the car, although the owner cannot control his work in the particulars in which the driver is controlled by the regulations. But broadly stated a contract of service does import that there exists in the person serving under the contract an obligation to obey the orders of the person served. A person employed to exercise his skill may or may not be a servant. The football player in *Walker* v. *Crystal Palace Football Club* (3) was held to be a workman, that is, to be employed under a contract of service, notwithstanding that in certain respects it was his duty to exercise his own judgment uncontrolled by anybody. On the other hand in *Bagnall* v. *Levinstein, Ld.* (4) a skilled chemist was held not to be a workman notwithstanding that his employment involved manual labour. "The root of the matter," said Collins M.R. in the last-mentioned case, "is that each case must be decided in view of that which the person whom it is sought

(1) (1880) 6 Q. B. D. 530, at p. 532.
(2) 4 E. & B. 570, at p. 578.
(3) Ante, p. 87.
(4) [1907] 1 K. B. 531.

to treat as a workman was employed to do." The question to be answered is, Was he employed as a workman or was he employed as a skilled adviser? I do not know whether it is possible to approach more closely to an answer to the question as to what is a contract of service under this Act than to say that in each case the question to be asked is what was the man employed to do; was he employed upon the terms that he should within the scope of his employment obey his master's orders, or was he employed to exercise his skill and achieve an indicated result in such manner as in his judgment was most likely to ensure success? Was his contract a contract of service within the meaning which an ordinary person would give to the words? Was it a contract under which he would be appropriately described as the servant of the employer? If the question which the county court judge puts to himself is that question, and his answer is given in view of those principles, then I think his finding is a finding of fact.

The question in this case then resolves itself into this: Was there such evidence before the learned judge as that he upon those principles could and did find as a matter of fact that this girl in giving lessons upon the pianoforte was contracting to use her skill to achieve the result of instructing the child in playing the piano, or was she placing herself in the position of owing the duty of obeying the mother's orders as to how she should give her lessons? In my judgment there was material upon which the learned judge could properly find that she was doing the former. He has so found, and in my judgment his finding must stand. For these reasons I think that this appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Baylis, Pearce & Co.*

Solicitors for respondents: *Hicklin, Washington & Pasmore.*

H. B. H.

C. A.
1910
Feb. 8.

[IN THE COURT OF APPEAL.]

EVANS *v.* VICKERS, SONS & MAXIM, LIMITED.

Employer and Workman—Compensation—Accident to a Minor—Review of Weekly Payments—Increase—Probable Earnings—Former Employment—Evidence — Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I.* (16.).

On an application to review the weekly payments by a workman on attaining twenty-one and more than twelve months after the accident, pursuant to the proviso to clause 16 of Sched. I. of the Workmen's Compensation Act, 1906:—

Held (Buckley L.J. dissenting), on the construction of the proviso, that the probable earnings of the applicant were not to be limited by reference only to the wages earned in the employment of the employer in whose service he was injured or in a like employment, but upon evidence, if necessary, of what the individual workman, "if he had remained uninjured," "would probably have been earning at the date of the review" in the employment which he followed before he entered the employment in which he was injured or in any different employment, and that the weekly payments might be increased accordingly.

Appeal against an award of the judge of the county court of Sheffield upon an application to review an agreement for compensation under the Workmen's Compensation Act, 1906. This appeal raised the question of the proper construction of the proviso to clause 16 of Sched. I. of the Act in calculating the wages which the workman after attaining twenty-one "would probably have been earning at the date of the review had he remained uninjured." (1)

The facts so far as material were as follows:

In July, 1907, the applicant, who was then about twenty years of age, applied to the respondents for employment as a labourer, and was taken on by them at 22*s.* a week. Before going to the

(1) The proviso to clause 16 is as follows: "Provided that where the workman was at the date of the accident under twenty-one years of age and the review takes place more than twelve months after the accident, the amount of the weekly payment may be increased to any amount not exceeding fifty per cent. of the weekly sum which the workman would probably have been earning at the date of the review if he had remained uninjured, but not in any case exceeding one pound."

respondents the applicant was by trade a stove-grate fitter, and he went to the respondents as a labourer because he was short of work, meaning to return to his former trade when work improved. While in the employment of the respondents the applicant met with an accident by which his right arm was injured. Liability was admitted, and compensation was paid by agreement at 11*s.* 4*d.* a week.

In February, 1909, the applicant had so far recovered that he was able to do light work, which was found for him by the respondents at the same rate of wages as he had received before the accident; the agreement giving compensation, which had been recorded, was then reduced to one penny a week.

In August, 1909, the applicant, having attained twenty-one, applied to review the agreement on the ground that under the terms of the proviso he "would probably have been earning at the date of the review, if he had remained uninjured," more than the old rate of wages, had he been able to return to his former trade.

The county court judge came to the conclusion, on the evidence as to the applicant's probable earnings as a stove-grate fitter, that he would have been able to earn 30*s.* a week had he remained uninjured; he therefore made an award that the penny a week should be increased to 7*s.* 6*d.* a week until further review.

The respondents appealed.

C. A. Russell, K.C., and *H. J. Waddy*, for the appellants. "Probable earnings" must be calculated by the amount the workman would probably have been earning but for the accident in the employment of the same master, or in employment of a like nature, having regard to the age of the applicant at the date of the accident and again at the date of the application to review, and to any increase of wages he would probably have been earning had he remained uninjured. "Probable" must be restricted to the case under review, having regard to the circumstances; the inquiry must be confined within reasonable limits.

Evidence as to what this workman might have earned as a stove-grate fitter in his previous employment or as a skilled

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mechanic with other employers is not admissible. If this kind of evidence is to be admitted, then this award cannot be disputed, but it is not properly admissible in cases of this kind, and the county court judge was wrong in law in taking this evidence into consideration.

Shakespeare, for the respondent (the workman). Proviso (*b*) to clause 1 of the First Schedule shews that a minor is treated on a different footing from an adult, and the proviso to clause 16 is only another illustration of this. This proviso was added to meet the supposed hardship caused by the decision in *Pomphrey* v. *Southwark Press*. (1)

Effect should be given to the plain words of the proviso, and in considering probable earnings the future must be taken into consideration. This workman was a skilled operative, and but for the accident would have returned to his trade as a stove-grate fitter, where he would have earned from 30*s*. to 35*s*. a week.

[He was stopped.]

COZENS-HARDY M.R. In my opinion the decision appealed against is quite right.

The question turns upon the true construction of two clauses of the First Schedule of the Workmen's Compensation Act, 1906. The general policy of the Act, where a man is injured, is undoubtedly this: you base his compensation upon his average weekly earnings. There are a series of sub-sections in clause 2 of this schedule dealing with that, but even in clause 1 a difference is made by proviso (*b*) in the case of a minor. By clause 1 (*b*), if an accident happens to a workman aged twenty-one, the employer is only liable during incapacity for work, to pay a weekly payment not exceeding 50 per cent. of his average weekly earnings; but by proviso (*h*), in the case of a minor at the date of the accident, if the average weekly earnings are less than 20*s*., then, during total incapacity, 100 per cent. shall be substituted for 50 per cent. of his average weekly earnings, but the maximum is not to exceed 10*s*. So that in the very first clauses of this schedule an infant is treated on a different footing to an adult, and it appears that the

(1) [1901] 1 Q. B. 86.

employer may have a greater liability imposed upon him if his injured workman is under twenty-one than if he is over twenty-one. The scheme of the Act is that both the employer and workman should have the right to review. That right to review is one of its most valuable features. It enables the employer to say, "True I was liable by reason of the accident which arose out of and in the course of the employment, but the man has completely recovered and my payment ought to cease"; or he may say, as was said in this case, "We are giving the injured workman light work and paying him his old wages, and, therefore, the award ought to be reviewed."

Now the clause dealing with review is clause 16. It provides that "any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum above provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act."

That is the general provision applicable to workmen who are not minors at the date of the accident. Then a very important, and I am bound to say what strikes me as an extremely fair and just, proviso is added at the end of clause 16. It says this: "Where the workman was at the date of the accident under twenty-one" —that is one condition—and, next, that more than twelve months has elapsed before the application for a review comes on, then in that case "the amount of the weekly payment may be increased to any amount not exceeding fifty per cent. of the weekly sum which the workman would probably have been earning at the date of the review if he had remained uninjured, but not in any case exceeding one pound." In my opinion "the workman" in that clause means this individual workman, and you cannot treat it as though it were simply a case of what any other workman or a workman in general might be earning. Still less, it seems to me, can you limit this proviso by considering what is the average sum which the workman would probably have been earning at the date of the review if he had remained uninjured and in the employment of the same master or in an employment of the like nature. It seems to me that the county court judge has the task—not an easy one—imposed upon him

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of saying this lad was injured during minority, and if he had not met with this accident, what is it probable that he, this individual workman, would have been earning at the date of the review when it comes before the county court judge more than twelve months after his first award.

The present case seems to me to be one which illustrates the justice and fairness of the interpretation which I put upon this proviso. Here you have a lad who was preparing for a trade. His father was a stove-grate fitter, and he was apprenticed to it, and he was competent, as far as a lad of his age could be competent, to enter the trade; but trade was bad, work was scarce, and he goes for a time to Vickers, Sons & Maxim as a labourer. While acting as a labourer he meets with this accident, and it is said that his right to review under this proviso ought to be cut down on the footing that he was a labourer when he met with the accident, and that the Court must consider what, as a labourer, he would probably have earned at twenty-one years of age. I decline to do that. I think in this case the learned county court judge had to say, "Here is an apprentice to a trade who meets with an accident which disables him from following his trade. What, but for that accident, would this man probably have been earning at the date of the review?" That is the question which the learned county court judge has put to himself. He has heard evidence which satisfied him of the facts which I have indicated. Those facts, I think, were proper for him to take cognizance of, and I think, therefore, that this appeal must fail. It is an appeal which can only succeed on the footing upon which counsel for the appellants have argued, namely, that you must exclude everything except this: that the man was a labourer in the employment of the respondents, and what is it probable that he at twenty-one, being in an employment of that nature, would have been earning. I decline so to construe the proviso, and the learned county court judge has done the same. The appeal must therefore be dismissed.

FLETCHER MOULTON L.J. I am entirely of the same opinion.

It appears to me that the Act recognizes that a boy is not in the maturity of his wage-earning power, and therefore it deals

with the case of a boy being injured separately and treats it in a different way to that in which it treats the case of an adult, who may fairly be considered in the maturity of his wage-earning power. Immaturity affects the wage-earning power in two ways. It not only affects it in respect to the quantum of pay, but it also affects it, or may affect it, in the character of the employment which the individual can take up. There are employments open to men which are not open to boys. The consequence is that the framers of the Act realized that it would be most unfair to those who were injured while they were still boys to take the actual circumstances of the employment at the time of the injury as dominating the compensation which ought to be given. For the first award, which no doubt would apply to the period immediately after the accident, it might be fair to take into consideration those circumstances to a certain extent. But even there we find that the provision with regard to boys is much more liberal in comparison with the wages that they were earning than it is with regard to men, because the power of earning rapidly increases with age. But when we come to the question of review, which relates to a time divided at least by a year from the time of the accident, we find that the Act makes a completely new departure. It makes no reference whatever to the circumstances at the time of the accident, but it says, in what to my mind are clear and unmistakable words, that the compensation shall be decided by what would probably be the wages earned by the individual who has suffered the accident. It may be increased to any amount not exceeding 50 per cent. of the weekly sum which the workman would probably have been earning at the date of the review if he had remained uninjured. I can see no two meanings that can fairly be put upon those words. Therefore I am of opinion that the county court judge decided this case on the right principle. We have not to consider whether the Act is fair or not fair in so providing. But I must say for myself that it seems to me to be eminently fair. The immature workman has been injured. He grows up to the time when he ought to be in the full possession of his earning power. What could be fairer than to regulate the compensation on the diminution of that wage-earning power

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when it is complete and in its maturity? I therefore think that in this respect the Act is fair, but, whether it is fair or not fair, I have no doubt that this is the meaning of the proviso in question.

BUCKLEY L.J. Suppose that a skilled factory operative of, say, twenty years of age, earning an average of, say, 40*s.* a week, is temporarily thrown out of employment by the closing of the mills: that going in search of work of that kind and failing to find it he takes a place as an under-gardener at 18*s.* a week, and in that employment is injured. The contention of the respondent is that, if he comes to review after he has attained twenty-one, the operation of this proviso is that the master, who has employed him as under-gardener at 18*s.* a week, is to pay him compensation upon the footing that he would, after twenty-one, have returned to work in a factory and have earned 40*s.* or more a week. Of course if the Act says so, I must give effect to it; the question is whether it does say so.

As I understand the scheme of this Act, speaking for the moment apart from this proviso, it is that as between employer and workman the employer is under a statutory obligation to compensate the workman pecuniarily, and the measure of the pecuniary liability is fixed with reference to the earnings of the workman in the employment of the employer. The First Schedule, (1.) (*a*), as regards death, and (1.) (*b*), as regards total or partial incapacity, says that you are in each case to look to the earnings in the employment of the same employer. That is qualified by (2.) (*a*) and (2.) (*c*). Under certain circumstances regard is to be had to the average weekly amount earned by a person in the same grade employed at the same work by the same employer or by a person in the same grade employed in the same class of employment and in the same district, and employment by the same employer is to be taken to mean employment by the same employer in the grade in which the workman was employed. The measure of pecuniary liability is fixed by reference to the wages earned by the workman in the employment of the employer in whose service he is injured.

The contention is that the proviso to clause 16 of the First Schedule departs from that principle altogether and adopts

another, namely, that regard is to be had not to the earnings in the employment in which the accident takes place or the probable earnings in that class of employment when the workman has attained twenty-one years of age, but to his probable earnings in any employment in which he might at that future time have become engaged. I have here the word "probable." To give effect to the words of the proviso I must first make the hypothesis that the man has not been injured. Having made that hypothesis, I must try to find out what is the weekly sum which the workman would "probably" have been earning at the date of the review. "The workman" there means, I think, "the injured man employed as he was in this work." To ascertain what a particular workman in a particular employment would "probably" have been earning in that employment if he had not been injured may be possible, but to ascertain the sum which a man would probably have been earning in any employment which he might have elected to take up in the future is so difficult as to my mind to be almost impossible. And the scheme of the Act is, I think, inconsistent with that construction. I think that the words mean this: I am to make the hypothesis that he has not been injured; I must then see what this workman, being such as he is, employed as he was by this employer, would probably have been earning at the future time if he had not been injured. I do not think that I ought to consider what other employment he might have taken up or returned to by that time; what I ought to consider is, this man being such a workman as he was at the time when the injury was sustained, and being then under age, what would have been the larger wage which, by reason of his being at the future time a man of full age, he would have been earning in that employment?

In arriving at this conclusion I have the misfortune to differ from the other members of the Court. I think that this appeal ought to succeed.

Appeal dismissed.

Solicitors: *Telfer, Leviansky & Co., for Clegg & Sons, Sheffield; H. C. Campion, for Neal & Co., Sheffield.*

W. C. D.

K. B. D.
1909
Nov. 24.
C. A.
1910
Jan. 14;
Feb. 1.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

In re TAYLOR.
Ex parte NORVELL.

Bankruptcy—Debtor and Creditor—Mutual Debts or Dealings—Contract by Debtor to sell Houses — Specific Performance — Set-off of Debt against Purchase-money—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 37, 38.

By two contracts dated respectively June 18 and July 2, 1908, the debtor agreed to sell for 880*l.* four houses which were subject to a mortgage for 600*l.* The debtor was indebted to the purchaser in the sum of 257*l.* for work done by the purchaser to certain houses, including those agreed to be sold. On July 11, 1908, the purchaser heard for the first time that the debtor had committed an act of bankruptcy on the previous June 30. On October 12, 1908, a receiving order was made against the debtor in a county court, and adjudication followed. The purchaser, having accepted the title and entered into possession, applied to the county court judge, against the trustee in bankruptcy, for specific performance of the two contracts and for a declaration that he was entitled to set off the 257*l.* due to him from the debtor against the balance of the purchase-money due from him to the debtor after deducting the amount due on the mortgage. The county court judge held that the purchaser was only entitled to specific performance on payment of the balance of the purchase-money in full to the trustee:—

Held by the Divisional Court and the Court of Appeal (Fletcher Moulton L.J. dissenting), that there had been mutual dealings between the debtor and the purchaser within the meaning of s. 38 of the Bankruptcy Act, 1883, and that the purchaser was therefore entitled to specific performance upon the terms that the 257*l.* due to him from the debtor be set off against the balance of the purchase-money.

This was an appeal from a decision of the county court judge at Halifax.

The debtor, Taylor, was a builder and was engaged in building a block of nine houses at Halifax. Norvell was a joiner and was doing the joinery work for the nine houses under a contract by which he was to be paid for the work by instalments on the certificate of the architect. At the time of the transactions hereinafter mentioned Norvell had received from the architect a certificate dated February 1, 1908, for 100*l.* on account, and he had also done further joinery work estimated at about 150*l.*, for which, as the parties knew, a final certificate would shortly

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be given by the architect. Taylor was unable to pay either the 100*l.* or the sum which would shortly become due. In these circumstances Taylor suggested to Norvell that in lieu of his receiving payment in cash he should purchase three of the houses in order that the whole of the amount due on the joinery contract might be cleared off. Accordingly, by an agreement dated June 18, 1908, Taylor agreed to sell to Norvell three of the houses at the price of 650*l.*, the purchaser to pay a deposit of 100*l.* on the signing of the agreement and the balance of 550*l.* on July 1, on which day the purchase was to be completed. A receipt for the 100*l.* deposit was signed by Taylor at the foot of the agreement, but the money was not in fact paid. On the perusal of the abstract of title it was discovered that these houses and also a fourth house were mortgaged to a building society for 150*l.* each, and the result was that the value of the equities of redemption in these three houses would not be sufficient to wipe off the whole of Taylor's indebtedness under the joinery contract. It was then arranged that Norvell should purchase the fourth house, and by an agreement dated July 2 Taylor agreed to sell to Norvell this house at the price of 230*l.*, of which a deposit of 1*l.* was to be paid on the signing of the agreement and the balance on July 4, on which day the purchase was to be completed. A receipt was given for the deposit, but no money was in fact paid. It was found as a fact by the county court judge that there was a verbal agreement between Taylor and Norvell that both the 100*l.* and the amount of the final certificate were to come out of the purchase-money of the houses.

On July 3 Norvell received from the architect a final certificate for 157*l.* 12*s.* 4*d.* On July 11 Norvell learnt for the first time that Taylor had on June 30 committed an act of bankruptcy. The title to the four houses was accepted, but whether before or after July 11 was in dispute, and on August 20 Norvell entered into possession of the rents and profits. On October 12 a receiving order founded on the act of bankruptcy above mentioned was made against Taylor, and adjudication followed. In November the mortgagees, the building society, threatened to sell the four houses under their power of sale, and on

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December 18 Norvell, in order to protect his interest in the equities of redemption, took a transfer of this mortgage.

Norvell then applied in the bankruptcy for an order against the trustee in bankruptcy that the two contracts of June 18 and July 2 should be specifically performed, and for a declaration that he was entitled to set off the 257*l.* 12*s.* 4*d.* against the balance of the purchase-money after deducting the amount due on the mortgage.

The county court judge held that Norvell was not entitled to a set-off and was only entitled to specific performance on payment of the balance of the purchase-money in cash.

Norvell appealed.

E. Clayton, *K.C.*, and *Cyril Atkinson*, for the appellant. Although no cash was actually handed over by the appellant, the deposit of 100*l.* was in law paid by him to the debtor. As to the balance of 157*l.* 12*s.*, by the contract with the debtor, which is binding on the trustee, the debtor agreed to take payment by way of set-off.

But apart from the right of set-off under the contract there were mutual credits between the appellant and the debtor within the meaning of s. 38 of the Bankruptcy Act, 1883. (1) All debts and liabilities which are the subject of proof under s. 37 of the Act of 1883 are capable of set-off under s. 38. The decision in *In re Daintrey* (2) shews that the appellant is entitled to have the houses conveyed to him by the trustee upon the terms that the 257*l.* 12*s.* due to him is set off against the sum due from

(1) Bankruptcy Act, 1883, s. 38: "Where there have been mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order shall be made under this Act, and any other person proving or claiming to prove a debt under such receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively; but a person shall not be entitled under this section to claim the benefit of any set-off against the property of a debtor in any case where he had, at the time of giving credit to the debtor, notice of an act of bankruptcy committed by the debtor, and available against him."

(2) [1900] 1 Q. B. 546.

him as the balance of the purchase-money. He is therefore entitled to call upon the trustee to specifically perform the contracts on payment of the sum due from him after deducting the 257*l.* 12*s.* [*Credit Co.* v. *Pott* (1) and *Peat* v. *Jones* (2) were also referred to.]

M. Shearman, *K.C.*, and *Hansell*, for the respondent. The purchase-money under a contract for the sale of land where the creditor who is the purchaser seeks specific performance is not a chose in action which is the subject of a set-off under s. 38 of the Bankruptcy Act, 1883: *Ex parte Rabbidge.* (3) The decision in that case shews that the claim which vests in the trustee, that the purchaser shall perform his part of the contract in order to be entitled to specific performance, cannot be extinguished under s. 38 of the Act of 1883, and that the right to specific performance is not a chose in action which can be the subject of a set-off. In order to give rise to a right of set-off the claims on both sides must be of such a nature as will necessarily result in a pecuniary liability on both sides: *Eberle's Hotels Co.* v. *Jonas.* (4) In the present case the trustee has the land vested in him subject to the equity attaching to it by virtue of the contract of purchase. The appellant has a right to a conveyance of the houses on payment of the purchase-money, and the only obligation of the trustee is to convey upon payment of the whole amount. The appellant cannot claim a right in rem and at the same time a right of set-off under s. 38 of the Act of 1883: *Palmer* v. *Day & Sons.* (5) The appellant's right under the contract is to have a conveyance of the land, and no right to set off debts arises.

PHILLIMORE J. In this case the material facts are that the appellant Norvell was doing joinery work for Taylor, who was a builder, and at the time of the transactions in question he had a certificate for 100*l.* for work done, and also had a claim for work done which had not yet ripened into a certificate, but which the

(1) (1880) 6 Q. B. D. 295.
(2) (1881) 8 Q. B. D. 147.
(3) (1878) 8 Ch. D. 367.
(4) (1887) 18 Q. B. D. 459.
(5) [1895] 2 Q. B. 618.

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parties knew would amount to between 150*l.* and 160*l.*, and which in fact worked out at 157*l.* 12*s.* 4*d.* Taylor was in difficulties and could not pay the 100*l.*, and suggested to Norvell that he should buy some of the houses in which Norvell was doing the work in order that the balance of his (Taylor's) debt arising under the joinery contract might be cleared off. This was agreed to, and Norvell signed two contracts dated respectively June 18 and July 2, 1908, for the purchase of four of the houses, and on July 3, 1908, the final certificate for 157*l.* 12*s.* 4*d.* was given. There was an act of bankruptcy committed by Taylor on the previous June 30, but Norvell had no knowledge of it until July 11. Another fact, which was not before the county court judge, is that on July 7 the title to the four houses was accepted, and the draft conveyance was returned approved by Taylor's solicitors to Norvell's solicitors. There was therefore nothing to be done but for Taylor to execute a conveyance and Norvell to pay any money that he had to pay. Before Taylor had executed the conveyance all the parties knew that he had committed an act of bankruptcy on the previous June 30. Then the mortgagees of the houses threatened to sell, and Norvell took a transfer of the mortgage to protect his interests, and subsequently launched his motion in the bankruptcy asking for specific performance of the two contracts and a declaration that he was entitled to set off the 257*l.* 12*s.* 4*d.* against the balance of the purchase-money. On behalf of the trustee it is contended that Norvell is only entitled to specific performance on payment of the balance of the purchase-money in cash. The county court judge was of opinion that in the special case of purchase-money payable on the specific performance of a contract the doctrine of mutual dealings laid down in s. 38 of the Bankruptcy Act, 1883, does not apply. In our opinion the claims in this case are sums due in respect of mutual dealings within the meaning of s. 38 of the Bankruptcy Act, 1883.

On behalf of the respondent the decisions in *Ex parte Rabbidge* (1) and *Eberle's Hotels Co.* v. *Jonas* (2) were relied upon. As to *Eberle's Hotels Co.* v. *Jonas* (2), explanatory comments were made upon that case in *Palmer* v. *Day & Sons* (3), where Lord

(1) 8 Ch. D. 367. (2) 18 Q. B. D. 459.

(3) [1895] 2 Q. B. 618.

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Russell of Killowen C.J., in delivering the judgment of the Court, said that "the mutual dealings must be such as will end on each side in a money claim. Otherwise the claims are incommensurable." In the language of Fry L.J. in *Eberle's Hotels Co.* v. *Jonas* (1), "it is impossible to bring into an account cigars on one side and a debt on the other, and to strike a balance between them." In the present case in order that the cross-claims may be commensurable the claim of the appellant must end in money, and we are of opinion that it does. It is, however, contended on behalf of the respondent that the decision in *Ex parte Rabbidge* (2) shews that money due from a purchaser claiming specific performance is not to be regarded as money which he is under any obligation to pay so as to make s. 38 of the Bankruptcy Act, 1883, applicable. But no decision to that effect was given in *Ex parte Rabbidge.* (2) It is true that there are expressions in the judgments in that case which, if read without reference to the subject-matter with which the judges were dealing, lend support to the contention in the present case on behalf of the respondent. In *Ex parte Rabbidge* (2) there had been a valid contract to sell and purchase land between the bankrupt and the purchaser, and the purchaser paid a deposit, as I gather, after an act of bankruptcy, but without notice of it. After adjudication—when consequently the bankrupt had no title—though without knowledge of it, he paid the balance to the bankrupt, and he sought to compel the trustee to convey the property without paying him anything. The answer to that claim was simple. The purchaser might as well have paid any stranger as the bankrupt after adjudication. No doubt there are expressions in the judgments which are wider than was necessary for the decision, but the judgments do not approach the case of a purchaser having an obligation which he is bound to discharge, which may end in a money claim, and which is to be set off against money due from the bankrupt to the purchaser. The question whether those obligations could be set off did not arise in that case. A contract for the sale of land is one which may at the option of either party be decreed to be specifically performed. It is not one of those contracts for which the only remedy is damages

(1) (1887) 18 Q. B. D. 459. (2) 8 Ch. D. 367.

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for the breach, but it is a contract for the breach of which one remedy is damages. And either side may claim, if they choose, damages for the breach in lieu of specific performance, but they cannot obtain both.

In the present case the appellant Norvell was under an obligation to the bankrupt to pay if required, upon receiving a conveyance of the land, the money due from him for the purchase of the land. It is quite true he is only liable to pay if required; but the words of s. 38 of the Bankruptcy Act, 1883, are quite wide enough to cover this, as is shewn by the judgments in *In re Daintrey.* (1) Any obligation prospective or contingent to which the bankrupt is subject, and which, if it becomes an attaching obligation, will result in a money claim, is, under s. 37, sub-ss. 3 and 4, of the Bankruptcy Act, 1883, to be estimated as at the date of the receiving order, and if the obligation arises out of mutual dealings between the debtor and a creditor it is the subject of set-off under s. 38. Any obligation of that nature, whether it binds the debtor or creditor, is capable of being set off under s. 38. It can be set off against a sum due from the other party, and similarly any sum due from the other party can be set off against it. Therefore the appellant Norvell is entitled to have his obligation estimated, and if when estimated it does not amount to more than the claim which he has against the bankrupt he is entitled to have it extinguished, and it is to be deemed that he has discharged all the conditions precedent which entitle him to specific performance. If his obligation amounts to more than his claim against the debtor he is entitled to have his obligation extinguished to the extent of his claim. In other words, the true view of the present case is as follows. The appellant Norvell has a right to specific performance, and the only question is as to the terms upon which he has that right. He has the right if he performs what is to be performed on his side. There is no magical virtue in the word "pay." In a contract where a person requires specific performance he must do all that on his part he has promised to do—he who seeks equity must do equity—and in the majority of cases where the contract is one of sale one party only will have to pay money. But this obligation like any

(1) [1900] 1 Q. B. 546.

other is one which he is bound to perform, unless he is, as he can be, discharged or released from the performance of it.

We are of opinion that the appellant Norvell has to the extent of 257*l.* 12*s.* 4*d.* performed all that was on his part to be done, and that he is entitled to say that the sum which he had to pay arose from an obligation on his part which to the extent of 257*l.* 12*s.* 4*d.* has been extinguished by a set-off against the obligation of the bankrupt to pay him that sum. I only want to add that the matter seems to me a fortiori as to the 100*l.*, part of the 257*l.*, or, to put it more pointedly, that as to this sum the receipt at the end of the contract, coupled with the known facts, is evidence on which a jury ought to have found that 100*l.* was then "in hand paid."

J. E. A.

LORD COLERIDGE J. I agree.

The trustee in bankruptcy appealed.

M. Shearman, K.C., and *Hansell*, for the trustee in bankruptcy. If a right will not necessarily end in a money claim at the time when the claimant first has notice of the act of bankruptcy on which the receiving order is made—in other words, if it first assumes that character against the trustee in bankruptcy—s. 38 of the Bankruptcy Act, 1883, the mutual credit clause, does not apply. In Dart on Vendors and Purchasers, 7th ed., vol. 1, p. 295, it is laid down that "if a purchaser receive notice of an act of bankruptcy by the vendor prior to completion, he can at once repudiate the contract and recover his deposit," and that proposition is supported by *Powell* v. *Marshall, Parkes & Co.* (1); and see *In re New Land Development Association and Gray.* (2)

On the facts of this particular case there was no period prior to the date when Norvell first became aware of the act of bankruptcy at which the debtor could have forced Norvell to take these houses, and for three months after the act of bankruptcy Norvell could not get a good title: Bankruptcy Act, 1883, s. 43. Under s. 38 the date at which the account is to be taken is the

(1) [1899] 1 Q. B. 710. (2) [1892] 2 Ch. 138.

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date of the receiving order, and the section deals with rights of set-off between the bankrupt himself and any other person, not between the trustee in bankruptcy and such other person: *In re Daintrey.* (1) At that date there were a claim by Norvell against the bankrupt and an obligation on Norvell's part to pay the trustee, not the bankrupt at all, and in such circumstances there is no mutual dealing within the meaning of the section: *Ex parte Rabbidge* (2); *Lister* v. *Hooson.* (3) Where there is a contract to sell land uncompleted at the date of the receiving order the purchaser can only demand specific performance by paying the purchase-money in cash to the trustee. The county court judge was therefore right. [They also referred to *Lord's Trustee* v. *Great Eastern Ry. Co.* (4)]

E. Clayton, K.C., and *Cyril Atkinson*, for Norvell. *Powell* v. *Marshall, Parkes & Co.* (5) was not a decision upon s. 38 and has no bearing on this case. *Ex parte Rabbidge* (2) is distinguishable because there the bankrupt paid the purchase-money to the wrong person and the decision was that that was not a good payment. As regards the 100*l.* covered by the first certificate there was a set-off before any act of bankruptcy was committed, and that operated as a valid payment in law apart from the Bankruptcy Act, 1883: *Credit Co.* v. *Pott.* (6) As regards the 157*l.* there has been what is equivalent to payment by virtue of the operation of s. 38 independently of an oral bargain, but the respondent also relies upon the oral bargain. If at the date of the receiving order there is indebtedness on both sides it is immaterial that that arises from entirely different transactions. There is no question as to the bankrupt's indebtedness to Norvell, and Norvell's obligation to the bankrupt arose on June 18 and July 3, the dates of the respective contracts, and is independent of the question whether the title was accepted before or after notice of the act of bankruptcy. There were therefore mutual dealings on those dates, and s. 38 makes the set-off equivalent to payment: *Ex parte Barnett.* (7) *In re*

(1) [1900] 1 Q. B. 546.
(2) 8 Ch. D. 367.
(3) [1908] 1 K. B. 174, at p. 176.
(4) [1908] 2 K. B. 54.
(5) [1899] 1 Q. B. 710.
(6) 6 Q. B. D. 295.
(7) (1874) L. R. 9 Ch. 293, 297.

Daintrey (1) is an a fortiori case. *Lister* v. *Hooson* (2) is distinguishable because in that case the obligation, qua obligation, did not arise before the bankruptcy.

M. Shearman, K.C., in reply.

Cur. adv. vult.

COZENS-HARDY M.R. This is an appeal from an order of the Divisional Court and it raises the question whether the respondent Norvell is entitled to a conveyance of the equity of redemption in certain property formerly belonging to Taylor, a bankrupt, without payment of any cash to the trustee. On January 18, 1908, the bankrupt entered into a written contract with Norvell, under which Norvell was to buy three houses for 650*l.* One hundred pounds was named as the amount of the deposit, a receipt for which was at the foot of the contract. At the date of that contract a sum of 100*l.* was owing by the bankrupt to Norvell. The deposit of 100*l.* was not in fact paid. On July 2 there was a further contract to buy a fourth house for 230*l.* At that date a further sum of 157*l.* was due from the bankrupt to Norvell. The time named for completion was not of the essence of either contract. An act of bankruptcy was committed on June 30, but Norvell had no notice of it until July 10 or 11. The receiving order was made on October 12, and ultimately Taylor was adjudicated bankrupt. The houses the subject-matter of the agreements were in mortgage. Norvell has obtained a transfer of the mortgages, and the balance of the purchase-moneys, after deducting the amount paid to the mortgagees, is less than 257*l.* In these circumstances Norvell alleges that by virtue of s. 38 of the Bankruptcy Act there has been a payment by him of the full purchase-money, and that he is entitled to specific performance against the trustee without any further payment. In the language of the section, "the balance of the account and no more shall be claimed or paid on either side respectively." In my opinion this contention must prevail. It is not alleged that the contracts were fraudulent or in any way open to objection. The effect of a contract for sale of real estate is that both the vendor and the purchaser are bound thereby. The purchaser has no right to

(1) [1900] 1 Q. B. 546. (2) [1908] 1 K. B. 174.

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say "I will not accept the title and I repudiate my bargain," and the vendor has no right to say "You have not yet accepted the title, and therefore I am not bound." The purchaser is bound if a good title can be made, or if he has by his conduct precluded himself from questioning the title. This being so, it seems to me that there was on the one side a debt due from Taylor to Norvell of 257*l.*, and on the other side a debt due from Norvell to Taylor of a sum less than 257*l.* in respect of the balance of the purchase-money. If I am right in this, the case seems to fall within the plain language of s. 38, and this was the view of the Divisional Court. It is not disputed that the title is good having regard to the conditions. I have not paused to consider at what time precisely the title was accepted, for in my view this is not really material if it be once determined that a good title has been made. The old form of a decree for specific performance used to declare that the contract ought to be specifically performed in case a good title could be made, and an inquiry was directed to ascertain that fact. But I conceive that the mere delay in working out that inquiry would not in any way alter the rights of the parties which arise out of the contract, under which the purchaser is in equity the owner of the land. If, however, it should be deemed material, I think there is evidence here that the title was accepted on July 10, and further that, even if it were not then accepted, Norvell by entering into possession of the rents and profits on August 20 is precluded from questioning the title. This is not an attempt to obtain possession from the trustee of a part of the bankrupt's estate without payment. In my view it is simply a case in which, having regard to s. 38, the bankrupt's trustee had no beneficial interest in the property, the full purchase-money having been paid.

A further ground upon which the respondent may possibly be entitled to succeed is this. It is found as a fact that there was a verbal collateral agreement that the debts due from Taylor to Norvell should be retained out of or set off against the purchase-money, but I prefer to base my judgment upon the reasons assigned by Phillimore J., which are in substance those which I have above expressed. The appeal must be dismissed with costs.

FLETCHER MOULTON L.J. The decision in this case must turn mainly on the view taken by the Court of the terms upon which it ought to grant as against a trustee in bankruptcy specific performance of a contract for sale of land made by the bankrupt with a purchaser who had no notice of any act of bankruptcy at the date when the contract was entered into.

The position of a trustee with regard to uncompleted contracts for the sale of real property by the bankrupt appears to me to be clear both on reason and authority. The purchaser of real estate by entering into the contract and paying a deposit obtains an equitable interest in the land itself and has a right upon payment of the balance of the purchase-money to have the land conveyed to him. But the owner of the land is still the legal owner subject to this equitable interest, and he has the right to transfer it—the transferee of course taking it subject to the equitable interest above mentioned. The purchaser (i.e., the person who has entered into the contract of purchase and paid the deposit) can under ordinary circumstances by application to the Court enforce his rights to a conveyance of the land against the new owner of the legal title (that is to say, he can require that the land shall be transferred to him) on his payment to such owner of the balance of the purchase-money. But he has no further or other right. This is precisely what occurs in the case of a bankruptcy. If the original contract of purchase is made with the debtor without notice of any act of bankruptcy the contract is a valid one and entitles the purchaser to have a conveyance of the property upon payment of the purchase-money. But by bankruptcy the legal title in the land passes to the trustee, and if the purchaser wishes to enforce the contract of purchase after bankruptcy has supervened the Court will enable him to do so, but only on the terms of his paying to the trustee the balance of the purchase-money. The trustee is in the position of the transferee of the legal title and as such is entitled to have the balance of the purchase-money paid to him.

That this reasoning applies to a case of bankruptcy is laid down by the Court of Appeal in *Ex parte Rabbidge.* (1) It forms the ground of the decision and therefore is, in my

(1) 8 Ch. D. 367.

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opinion, binding upon us. In that case the purchaser paid the balance of the purchase-money to the bankrupt after the adjudication, though without notice of it. He then applied to the Court for an order upon the trustee to assign the property to him. The Court of first instance made such an order. An appeal was brought to the Court of Appeal, and it is evident from the argument that counsel for the trustee took up the position that because the legal estate in the property was vested in the trustee he could not be ordered to assign it to the purchaser except on the terms of the unpaid purchase-money being paid to him. They were then stopped by the Court, and counsel for the respondents attempted to support the order of the Court of first instance not only on the ground that the payment was good as against the trustee, but also on another ground not material to the present case. The Court, therefore, had to consider the position of a trustee in bankruptcy with regard to an uncompleted contract for the sale of land, and James L.J. in his judgment says: "The bankrupt, who was the owner of real estate, entered, before the adjudication was made, into a contract to sell it, a contract which I will assume for the present purpose was a transaction protected by ss. 94 and 95 of the Act. The result was that, upon the adjudication being made, the legal estate in the property vested in the trustee in the bankruptcy, subject to the equity of the purchaser under the contract. That equity gave him a right to have the property conveyed to him, upon payment of the purchase-money to the person to whom the property belonged. It is the purchaser's misfortune that he has paid the money to a person who had then ceased to be the owner of the property. But that can give him no equity to take the property away from the real owner without paying him for it." The language of Cotton L.J. and Thesiger L.J. is equally clear. They treat the trustee as the actual legal owner of the estate and say that he cannot be compelled to convey it until the balance of the purchase-money has been paid to him as such owner. It is quite true that in that case the money had been paid to the bankrupt, who had no title to receive it, and therefore the balance had not in law been paid at all. But the reasoning of all three Lords

Justices is independent of that fact, and inasmuch as the decision binds us we must, in my opinion, regard a trustee in bankruptcy as having become by operation of law the legal owner of the property subject to the equitable interest of the purchaser and entitled as such legal owner to be paid the balance of the purchase-money before he can be required to convey.

I have looked in vain for any case which conflicts with the above decision or which countenances the view that the trustee will be compelled by the Court to transfer the property on any other terms than those on which any other owner would be compelled to do so, namely, the payment to him of the balance of the purchase-money. And in my opinion to do otherwise would be very unjust to the other creditors of the bankrupt. The fact that the Court will decree specific performance and not leave the purchaser to his remedy in damages does not alter the fact that at the date of the bankruptcy the land (subject to the equitable right of the purchaser) formed part of the estate of the bankrupt and passed as such to the trustee. It is contended on behalf of the respondent that the trustee is bound to transfer this portion of the estate to the purchaser in return for what represents probably only a minute portion of its stipulated price in the shape of diminution of the purchaser's proof. This would be in striking contrast to the recognized principles of bankruptcy. Suppose that the purchaser did not specifically enforce his contract, but elected to take damages for its non-performance, no one can doubt that the estate would only have to pay a dividend on the amount of such damages and not the sum in full. In the case of contracts validly made by the debtor but not of a kind which the Court will order to be specifically performed the same is true. The payments to be made to the bankrupt under such contracts are equally binding with those to be made in respect of the purchase of land, but it cannot be doubted that in such a case the trustee electing to perform the contract would be entitled to be paid the price of the goods in cash and not by a set-off. I can see no reason why the form of the remedy should affect the position of the parties with regard to substance, or why the Court should in the case of bankruptcy depart from the universal rule that specific performance will only

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be decreed on the terms that the balance of the purchase-money shall be paid to the person who is the owner of the property at the time when specific performance is decreed and who is ordered by the Court to convey it.

The contention on behalf of the respondent is based on the language of s. 38 of the Bankruptcy Act, 1883. It is said that the balance of the purchase-money is subject to the provisions as to mutual credits, mutual debts, and mutual dealings, and that the purchaser is entitled to set off the balance of the purchase-money as moneys due from the bankrupt. In my opinion this reasoning is not sound. The balance of the purchase-money was not due at the date of the receiving order and did not become due until the doing of an act by the trustee, namely, the execution of the conveyance. This does not mean that it was at the date of the receiving order in the position of a debt payable in futuro or even contingently. The contract of sale might never have been carried out; then the purchase-money would never have become due. When carried out it was carried out by a person other than the bankrupt, namely, the trustee, to whom the legal estate passed on the bankruptcy. In my opinion, therefore, the debts existing before the bankruptcy and the liability to pay the purchase-money in order to obtain the conveyance of the property are not debts between the same parties and in the same interest. The money never becomes due to the bankrupt—it becomes due first to his trustee, and then by virtue of something that the trustee does either voluntarily or at the suit of the purchaser. To my mind it may, as I have said, be fairly compared to a case where the bankrupt has entered into a contract of sale for future delivery and has gone bankrupt before the time for delivery arrives. If the trustee elects to fulfil the contract on tendering the goods the price becomes due from the purchaser to him by reason of that tender, and the purchaser could not set off against the price of the goods some debt provable by him in bankruptcy, notwithstanding the fact that the payments for the goods were contractually binding upon the debtor by a valid contract existing at the date of the bankruptcy.

The facts of the case so far as is material for my decision are as follows. Taylor, the bankrupt, was engaged in a building

scheme which included the building of nine houses, and Norvell, the respondent, had contracted to do the joinery. A certificate for 100*l.* in respect of work done had been given to him by the architect in February, 1908, and was due and unpaid at the time of the subsequent transactions. Since the giving of that certificate he had done other work, and no doubt it was known both to the bankrupt and to Norvell that a certificate for between 150*l.* and 160*l.* would be given to him by the architect later. As Taylor could not pay either the existing debt of 100*l.* or the further debt which would become due on the second certificate, an arrangement was made that Norvell should take over three of the houses (which were subject to mortgages to a building society), it being thought that the value of these houses subject to the mortgages would be equivalent to the debt, and on June 18 an agreement was made between Taylor and Norvell whereby Taylor agreed to sell and Norvell agreed to purchase the three houses for 650*l.*, paying a deposit of 100*l.* That deposit was not paid in money, but there is a receipt given for it at the bottom of the agreement, and the evidence convinces me that it was then arranged that that 100*l.* should be satisfied by the set-off of 100*l.* due on the existing certificate. This agreement of set-off was made when no act of bankruptcy had been committed, and amounted to a valid payment in full which cannot be challenged.

Shortly after the making of this agreement Norvell discovered that the mortgages were heavier than he had been led to understand and that the three houses would not be adequate payment for the amount of his debt when the new certificate was given. Accordingly, by an agreement dated July 2, Taylor agreed to sell to him and he agreed to purchase another house for the sum of 230*l.* The deposit was a nominal one of 1*l.* and nothing was paid. On July 3 a final certificate for 157*l.* 12*s.* was given to Norvell by the architect.

The act of bankruptcy upon which the debtor was adjudged bankrupt was committed on June 30, but it did not come to the knowledge of Norvell until July 11. In the meantime the parties had been going on with the preparations for completing the contract, and it is quite clear to me from the letters which passed at the time and which were before us that the title was not accepted

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nor were the requisitions answered until after July 11. In my opinion nothing that happened after knowledge of the act of bankruptcy came to Norvell can better his position, and therefore I do not deal with the various appointments that were subsequently made for completion before the adjudication took place. I will only refer to the letter of September 18 from Norvell's solicitors to Taylor's solicitors. In this they propose without prejudice to complete on September 30, but remind him that they have not received the complete abstract of title, and that it must be distinctly understood that in fixing a date for completion they do not waive their right to require the same, and they proceed to make certain demands with regard to the requisitions they have already sent in. In my opinion, therefore, the contract of sale was not only not formally completed, but the purchaser was insisting on the compliance of the vendor with certain requisitions of a date long subsequent to knowledge of the act of bankruptcy upon which the adjudication took place.

Upon these facts and the evidence relating to them I am of opinion that the written contracts do not express the real contract between the parties, which was that the houses should be taken over in exchange for and in satisfaction of the particular liability on the two certificates, and that this would have been a good defence because the true contracts were not in writing. But I will assume in favour of the respondent that the arrangement with regard to set-off was a collateral arrangement and that the written agreements contain the true contracts between the parties. The contracts which the Court is called upon to enforce are therefore contracts in which the purchase is to be made by payment in the usual way. In such a case, as I have already said, no right of set-off under the mutual credits clause, in my opinion, arises. The only special question in the present case is as to whether the collateral agreement to set off the money so to be paid on completion against the existing debt affects the matter or can be enforced against the trustee. Now it is clear from the evidence that this set-off was to take place at completion. It was not an agreement whereby the debts were then and there taken as payment for the houses. Had it been so the debts would have been absorbed by the first contract and

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there would have been no consideration whatever for the second. It was an agreement at a future time to set off the debts against the price which should then become due, and it is clear that such a contract made with the bankrupt could not be specifically enforced against his trustee after adjudication. These special facts therefore make no difference, and the case is the same as though it had been an ordinary contract of purchase for a sum of money. Nor do I think that the fact that the land was in mortgage affects the matter. I am therefore of opinion that the decision of the learned county court judge was correct, and that this appeal ought to be allowed.

BUCKLEY L.J. The debtor Taylor was a builder and was erecting certain houses. Norvell was a joiner and was executing the joinery work under a contract by which Taylor was bound to pay him by instalments on the architect's certificate. On July 11 Norvell had notice of an act of bankruptcy committed by Taylor on June 30. On October 12 a receiving order was made. Prior to those dates the following events had happened. Norvell was on June 18 the holder of the architect's certificate for a sum of 100*l.* The debtor could not pay it, and on June 18 there was executed an agreement by which the debtor agreed to sell Norvell three houses at the price of 650*l.*, the purchaser to pay a deposit of 100*l.* on the signing of the agreement and pay the balance of 550*l.* on July 1, on which day the purchase was to be completed. On June 18 there existed therefore two debts, each of 100*l.*, capable of being set off. At this date it was overlooked that there were mortgages of 150*l.* on each house, making 450*l.* in all, so that of the 650*l.* there remained only a further 100*l.* for the purchase-money under this contract. On July 3 Norvell received a further certificate for a sum of 157*l.* 12*s.* 4*d.* In anticipation of that certificate, and having regard to the amount which was known or estimated to be due from Taylor to Norvell and to the fact that it had been found that there existed the above-mentioned mortgages upon the three houses, a further agreement was on July 2 executed by which Taylor agreed to sell Norvell a fourth house for 230*l.*, of which 1*l.* was to be paid as deposit and the balance of 229*l.* was to be paid on July 4, on

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which day the purchase was to be completed. The result of the above facts is that there were mutual dealings between Norvell and Taylor, namely, a dealing in respect of the contract for the joinery work, which resulted in debts due from Taylor to Norvell, and dealings evidenced by the agreements of June 18 and July 2, by which Norvell became debtor to Taylor. Under these circumstances it is plain that s. 38 of the Bankruptcy Act, 1883, had effect. That is a section under which if there are mutual dealings a set-off is to take place by virtue of the statute, whether the result of the set-off be to the benefit or to the detriment of the estate of the bankrupt. The sum due from the one party is to be set off against any sum due from the other party, and the balance and no more is to be claimed (that is, against the bankrupt estate) or paid (that is, by the other party) as the case may be. Upon the execution of the agreements of June 18 and July 2 the houses became in equity the property of Norvell and the purchase-money became a debt payable at a subsequent date by Norvell to Taylor. The set-off of the one debt against the other does not result in transferring from the bankrupt estate to the creditor any specific property of the bankrupt, namely, the houses. The property had passed before contractually under the agreements. Under s. 37 all liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order are debts provable in bankruptcy. All such debts and liabilities resulting from mutual dealings are within s. 38. The latter is a section directing a statutory set-off for the purpose of ascertaining the amount which can be proved. The subsequent facts are that the title was accepted, possession was taken, and the debts in respect of the purchase-moneys under the agreements of June 18 and July 2 became payable. They were debts in respect of a contract existing at the date of the receiving order, and by virtue of s. 38 there is necessarily a statutory set-off. The decision of this Court in *In re Daintrey* (1) is in my opinion directly in point. It was indeed a stronger case than the present, because in that case the debt of 300*l.* which was to be the subject of set-off was a debt whose existence and amount were alike contingent at the date of the receiving order.

(1) [1900] 1 Q. B. 546.

There might have been no profits in respect of the business sold. Moreover, Lindley M.R. there stated that the liability to pay the 300*l.* was conditional (see pp. 572, 573), although the report does not disclose what the conditions were. Sect. 38 is applicable where the mutual dealings result in a debt which is not contingent only but conditional also. For these reasons I am of opinion that the decision under appeal is right.

There exists, however, another ground to which I have heard no answer, and that is that as a matter of fact the two agreements of June 18 and July 2 were in fact made upon an express agreement that there should be a set-off between the amounts due in respect of the certificates and the amounts becoming due under those agreements in respect of the purchase-money. A receipt for the 100*l.* deposit on the agreement of June 18 is signed at its foot, although it was not in fact paid. The whole object and purpose of the sales were that the claim of the creditor should be satisfied by the creation and satisfaction of the debts in respect of the purchase-moneys for the properties, and the agreement of July 2 was made because it was found that the agreement of June 18 was insufficient for that purpose. In my judgment the appeal must be dismissed with costs.

Appeal from Divisional Court dismissed.
Appeal from County Court allowed.

Solicitors for trustee in bankruptcy: *Helliwell, Harby & Evershed, for Jubb, Booth & Helliwell, Halifax.*

Solicitors for applicant: *Jaques & Co., for Moore & Shepherd, Halifax.*

H. B. H.

1910
Jan. 11.

PLAISTOW WORKING MEN'S CLUB AND ANOTHER *v.* HARROD.

Licensing Acts—Refusal of Renewal of Licence—Premises subsequently occupied by Club—Order by Court of Summary Jurisdiction that Club be struck off Register—Refusal to renew Licence within twelve Months preceding Formation of Club—Date from which Period of Twelve Months runs—Licensing Act, 1902 (2 *Edw.* 7, *c.* 28), *s.* 28, *sub-s.* 1 (*f*)—*Licensing Act*, 1904 (4 *Edw.* 7, *c.* 23), *s.* 1, *sub-ss.* 1, 2; *s.* 8, *sub-s.* 2—*Licensing Rules*, 1904, *r.* 2, *clause* 1.

By s. 28, sub-s. 1 (*f*), of the Licensing Act, 1902, a Court of summary jurisdiction may strike a club off the register on the ground that it occupies premises in respect of which within twelve months next preceding the formation of the club the renewal of a licence has been refused.

By ss. 1 and 8, sub-s. 2, of the Licensing Act, 1904, coupled with the definition contained in r. 2, clause 1, of the Licensing Rules, 1904, the power in a county borough to refuse the renewal of an existing on licence (except the power of refusal on certain grounds which do not include redundancy) is transferred from the licensing justices to the "compensation authority," but can only be exercised by that authority on a reference from the licensing justices and on payment of compensation in accordance with the Act.

On May 22, 1908, the compensation authority refused to renew an on licence on the ground of redundancy of the licensed premises. Pending the determination of the amount of compensation payable under the Act of 1904 the licence in respect of the premises was twice provisionally renewed under rr. 41 and 43 respectively of the Licensing Rules, 1904. On June 5, 1909, the compensation was paid to the persons interested, and on June 9, 1909, the premises which had remained open under the provisional renewals of the licence were closed. On June 10, 1909, the premises were opened as a club:—

Held, that the renewal of the licence was refused within the meaning of s. 28, sub-s. 1 (*f*), of the Licensing Act, 1902, on May 22, 1908, the date when the compensation authority actually gave their decision refusing to renew, and not on June 9, 1909, when the refusal became operative by the closing of the licensed premises, and that, as the renewal of the licence had not been refused within twelve months next preceding the formation of the club, the Court of summary jurisdiction had no power to strike the club off the register under the provision contained in s. 28, sub-s. 1 (*f*), of the Act of 1902.

CASE stated by the stipendiary magistrate for the county borough of West Ham.

On July 22, 1909, a complaint was preferred by the respondent Harrod, an inspector of the metropolitan police, under s. 28 of the Licensing Act, 1902 (1), against the appellants, the

(1) Licensing Act, 1902, s. 28, sub-s. 1: "Where a club has been registered in pursuance of this Act, a Court of summary jurisdiction, on complaint in writing by any person, may, if it thinks fit, make an order directing the club to be struck off the register on all or any of the following grounds, namely— . . . .

"(*f*) that the club occupies premises in respect of which, within twelve months next preceding the formation of the club . . . . the renewal of a licence has been refused."

Sub-s. 4: "Where the Court makes an order striking a club off the register, the Court may, if it thinks fit, by that order further direct that the premises occupied by the club shall not be used for the purpose of any club which requires registration under this Act for a specified period, which may extend to twelve months . . . . "

Licensing Act, 1904 (4 Edw. 7, c. 23), s. 1, sub-s. 1: "The power to refuse the renewal of an existing on licence, on any ground other than the ground that the licensed premises have been ill-conducted or are structurally deficient or structurally unsuitable, or grounds connected with the character or fitness of the proposed holder of the licence, or the ground that the renewal would be void, shall be vested in quarter sessions instead of the justices of the licensing district, but shall only be exercised on a reference from those justices and on payment of compensation in accordance with this Act."

Sub-s. 2: "Where the justices of a licensing district, on the consideration, by them, in accordance with the Licensing Acts, 1828 to 1902, of applications for the renewal of licences, are of opinion that the question of the renewal of any particular existing on licences requires consideration on grounds other than those on which the renewal of an existing on licence can be refused by them, they shall refer the matter to quarter sessions, together with their report thereon, and quarter sessions shall consider all reports so made to them, and may if they think it expedient . . . . subject to the payment of compensation under this Act, refuse the renewal of any licence to which any such report relates."

Sect. 5, sub-s. 2: "Quarter sessions may delegate any of their powers and duties under this Act to a committee . . . ."

Sect. 8, sub-s. 2: "This Act shall apply to a county borough as if it were a county, with the substitution for quarter sessions of the whole body of justices acting in and for the borough."

Licensing Rules, 1904, r. 2, clause 1: "In these rules—

"'The compensation authority' means . . . . as respects a county borough, the whole body of justices acting in and for the borough, ... and includes, with regard to any matter delegated to a committee under sub-s. (2.) of s. 5 of the Act, the committee to which the matter is delegated."

Rule 41: "Where, under section one of the Act, the renewal authority

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Plaistow Working Men's Club and Institute, and Henry Aspen, its secretary, for that the club, being a club registered under the Licensing Act, 1902, was the occupier of certain premises in respect of which within twelve months next preceding the formation of the club the renewal of a licence had been refused.

On the hearing of the complaint the magistrate made an order in pursuance of s. 28 of the Act of 1902 directing the club to be struck off the register, and that the premises occupied by it should not be used for the purposes of any club requiring registration under the Act of 1902 until June 12, 1910.

Upon the hearing of the complaint the following facts were proved or admitted:—The premises occupied by the club had been for many years licensed premises whereat one William Long was licensed to sell beer and wine by retail for consumption on or off the premises. On March 6, 1908, the licensing justices of the borough of West Ham at their general annual licensing meeting determined to refer the renewal of the licence to the compensation authority for the borough on the ground of redundancy of the licensed premises, but renewed the licence to Long in respect of the premises provisionally in pursuance of r. 41 of the Licensing Rules, 1904. On May 22, 1908, the compensation authority refused to renew the licence to the premises. On July 10, 1908, the compensation authority offered a sum as compensation to the persons interested in the premises

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refer the question of the renewal of a licence to the compensation authority, the renewal authority shall grant the renewal of the licence in accordance with the terms of the application, but shall insert in the licence a statement as to the renewal of the licence being provisional."

Rule 42: "If the compensation authority refuse the renewal of any licence the renewal of which is provisional . . . . the licence shall cease to have effect as from the expiration of the seventh day after the date fixed under these rules for the payment of the compensation money."

Rule 43: "Where compensation becomes payable in the case of a licence provisionally renewed, and it appears to the renewal authority at the next general annual licensing meeting after the licence has been provisionally renewed that the compensation money has not been paid and is not likely to be paid before the next fifth day of April, they shall, on a proper application being made for the purpose at that meeting, grant a further provisional renewal of the licence in accordance with the foregoing rules."

in pursuance of the Licensing Act, 1904, which was refused, and the question was then referred to the Inland Revenue Commissioners for determination.

Notice of appeal against the determination of the Inland Revenue Commissioners was served upon them in pursuance of s. 2 of the Licensing Act, 1904, and at the general annual licensing meeting for the borough held in February, 1909, a further provisional renewal of the licence was, in pursuance of r. 43 of the Licensing Rules, 1904, granted to Long in respect of the licensed premises pending the determination of the appeal against the decision of the Commissioners and the payment of the compensation sum to be ultimately determined in the appeal. On May 21, 1909, the appeal having been abandoned, the compensation authority at a supplemental meeting held on that day made an order distributing the amount of compensation determined by the Commissioners amongst the persons interested in the licensed premises, and on June 5, 1909, the respective shares of the compensation sum were paid to the persons interested, and on June 9 Long, who had been trading at the premises since March 6, 1908, closed the licensed premises. On June 10, 1909, the premises were opened as the club, which had been registered in pursuance of ss. 24 and 25 of the Licensing Act, 1902, on June 7, 1909.

On the part of the respondent it was contended that on the above facts the magistrate was empowered in law to make an order striking the club off the register of clubs and disqualifying the premises for a period of twelve months by reason that the renewal of the licence theretofore existing in respect of the premises had been refused within twelve months next preceding the formation of the club. On behalf of the appellants it was contended that the renewal of the licence had been refused on May 22, 1908, and that twelve months at least had expired from that refusal to the formation of the club, as evidenced by its registration and occupation of the premises.

The magistrate was of opinion that he was in law entitled to make an order striking the club off the register and disqualifying the premises for a period of twelve months, and he accordingly made the order.

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The question for the opinion of the Court was whether the magistrate came to a correct determination in point of law.

Danckwerts, *K.C.*, and *Bodkin*, for the appellants. The meaning of s. 28 of the Licensing Act, 1902, is that premises must not be opened as a club within twelve months from the refusal of the compensation authority to renew the licence, i.e., in the present case from May 22, 1908. As the premises were not opened as a club until June 10, 1909, more than twelve months had elapsed from the refusal of the renewal. The licence in respect of which the provisional renewals were granted under rr. 41 and 43 of the Licensing Rules, 1904, and under which the premises were carried on as licensed premises until they were closed, is of a different nature from a licence dealt with under the Licensing Act, 1902. That Act refers to the licence which lasts from April 5 to April 5 in each year under the Alehouse Act, 1828 (9 Geo. 4, c. 61), s. 13. When the renewal of that licence was refused on May 22, 1908, Long, the licensee, could never obtain that licence again, and the provisional licences were merely authorities to keep the premises open for the sale of liquor until the compensation was ascertained. Sect. 34, sub-s. 1, of the Licensing Act, 1902, provides that that Act is to be construed as one with the Licensing Acts, 1828 to 1886, and s. 10, sub-s. 1, of the Licensing Act, 1904, provides that that Act is to be construed as one with the Licensing Acts, 1828 to 1902. The judgment of the Earl of Selborne L.C. in *Canada Southern Ry. Co.* v. *International Bridge Co.* (1) shews that every provision of each statute from 1828 to 1904 must be construed as if these provisions had been contained in one Act, unless there is some manifest discrepancy, making it necessary to hold that a later Act has to some extent modified something in an earlier Act. It follows that the definition of a licence contained in s. 74 of the Licensing Act, 1872 (35 & 36 Vict. c. 94) (which refers to the licence under the Act of 1828 lasting from April 5 to April 5), applies to licences dealt with by the Licensing Act, 1902, and which the compensation authority refuse to renew under s. 1, sub-s. 2, of the Licensing Act, 1904.

(1) (1883) 8 App. Cas. 723.

It is clear that that definition excludes provisional licences granted under rr. 41 and 43 of the Licensing Rules, 1904. There is no reason why the words "refuse the renewal" of a licence should be construed in any other sense than their ordinary meaning. That meaning is that the compensation authority finally determines not to renew the licence. [Rules 14, 18, and 21 of the Licensing Rules, 1904, *Malkin* v. *Rex* (1), and *Horton* v. *Penn* (2) were also referred to.]

Horace Avory, K.C. (*Travers Humphreys* with him), for the respondent. The words "renewal of a licence has been refused" in s. 28, sub-s. 1 (*f*), of the Licensing Act, 1902, must be construed having regard to the provisions contained in the Licensing Act, 1904. A provisional licence granted under the Licensing Act, 1904, is more than a permit to carry on the sale of liquor in connection with the premises. It is the renewal of the licence applying to the premises. The Licensing Rules, 1904, have the force of a statute. Rules 41, 42, and 43 refer to *the* licence, and the effect is that the licence, i.e., the licence the renewal of which has been refused by the compensation authority under s. 1, sub-s. 2, of the Licensing Act, 1904, is renewed until the refusal becomes operative, which must be either when the compensation money is paid or the licensed premises are closed. In *Malkin* v. *Rex* (1) Walton J. did not deal with the general question as to what amounts to a renewal or refusal of a licence, and his decision in that case has no application. [Rules 44 and 45 of the Licensing Rules, 1904, were also referred to.]

LORD ALVERSTONE C.J. In my judgment this appeal must be allowed. I come to that conclusion with very great reluctance, because the result of our decision is that a very useful provision in the Licensing Act, 1902, and one which was designed to give the great advantage arising from the prevention of the establishment of clubs upon premises which had been very recently licensed, is in the circumstances of this particular case not operative. But in my opinion the language of s. 28, sub-s. 1 (*f*), of the Licensing Act, 1902, is so strong that we cannot come to any other conclusion than that which I am about to express.

(1) [1906] 2 K. B. 886. (2) [1907] 1 K. B. 561.

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The Licensing Act, 1902, provides by s. 28, sub-s. 1, that a registered club may be struck off the register on the ground, among others, "(*f*) that the club occupies premises in respect of which within twelve months next preceding the formation of the club . . . . the renewal of a licence has been refused." Speaking only for myself, if it had been possible to construe those words in the sense that the licence is no longer in operation, i.e., as having reference to the date when the licence has come to an end, I should have thought that the contention of the respondent might be supported, but I am of opinion that those words cannot reasonably be construed in that sense, although I have not such a strong opinion upon the matter as my brothers. At the time of the passing of the Licensing Act, 1902, the refusal of the renewal of a licence was a well-known act of judicial procedure, and I am not able to say that before the passing of the Licensing Act, 1904, the twelve months mentioned in clause (*f*) of s. 28, sub-s. 1, of the Act of 1902 could have been held to run from any other date than the refusal of the renewal of the licence by the tribunal in which the power of refusal was then vested. If the licensing justices at licensing sessions refused to renew a licence, it was from that date that, in my opinion, under the Act of 1902 the twelve months began to run. On behalf of the respondent that was not seriously disputed.

We must therefore consider whether the Licensing Act, 1904, has altered the date from which the twelve months would have run under the Act of 1902 to a later date, and, if so, to what later date. It is first to be observed that s. 1 of the Licensing Act, 1904, did not purport to make any difference or distinction with reference to the particular provision contained in s. 28, sub-s. 1 (*f*), of the Act of 1902. Its effect was to transfer to another body, namely, quarter sessions in counties and (s. 8, sub-s. 2) the whole borough of justices in county boroughs (conveniently referred to in the Licensing Rules, 1904, as the "compensation authority"), the right of refusing the renewal of a licence upon certain grounds which were taken away from the licensing justices. In those circumstances, prima facie the only change made was that the compensation authority under the Act of 1904, as distinguished from the licensing justices under the Act

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of 1902, refused the renewal of licences, and in my opinion, if there were nothing more bearing upon the matter, the refusal of the renewal of the licence in the present case by the compensation authority on May 22, 1908, would be the corresponding judicial act from which the twelve months mentioned in s. 28, sub-s. 1, clause (*f*), of the Licensing Act, 1902, were to run. But it is contended on behalf of the respondent that rr. 41, 42, and 43 of the Licensing Rules, 1904, shew that the effect of the Licensing Act, 1904, and those rules, which have statutory force, is that the licence is renewed up to the time when the compensation money is paid under s. 2 of that Act or a certain number of days afterwards, and we are asked to say that, inasmuch as in the present case the licence was provisionally renewed for the purpose of enabling the scheme of compensation under the Act of 1904 to be worked out, there was not on May 22, 1908, a refusal to renew the licence within s. 28 of the Act of 1902 or the concluding words of s. 1 of the Act of 1904.

With some hesitation I have come to the conclusion that that contention cannot be supported. It appears to me that, whatever may have been the intention of the Legislature in enacting the provisions contained in the Licensing Act, 1904, as to the business being carried on by the licensee until his compensation was paid, and whatever language they may have used in describing the instrument or authority under which he shall be at liberty to sell in the meantime, the whole of the legislation is governed by the initial fact that there has been a refusal to renew the licence to which the report made under s. 1, sub-s. 2, of the Licensing Act, 1904, relates, or, in other words, everything subsequently done is merely in the nature of machinery to enable the compensation to be properly adjusted upon the assumption that there has been a refusal of the renewal of the licence. The adjustment may take place within a very short time from the refusal to renew in the event of an arrangement being come to with the persons interested, or it may take a longer time, as in the present case, where there has been a dispute as to the amount to be paid, consequent appeals, and a final settlement at a period of more than twelve months after the refusal to renew by the compensation authority. But in my judgment, whatever

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the length of that period may be, the refusal to renew by the compensation authority under the Licensing Act, 1904, corresponds with the refusal to renew by the justices which would have taken place under the Licensing Act, 1902, if the Act of 1904 had not been passed, and nothing which happens afterwards can prevent that being a refusal, which is the only ground upon which compensation becomes payable under s. 2 of the Act of 1904. In my opinion, therefore, the refusal to renew the licence in the present case took place on May 22, 1908, and as this house was not opened as a club within the period prohibited by the Licensing Act, 1902, this appeal must be allowed. It appears to me to be worthy of consideration as to whether there ought not to be an amending Act passed, if the matter is found to be of practical importance, because I cannot think that in passing the Act of 1904 the Legislature intended to allow premises to be kept open as a public-house with such a short period intervening between the time they are closed as licensed premises and the establishment of a club therein.

BUCKNILL J. I agree, and I think that the case is quite clear, and that there is no doubt as to what our decision ought to be. On May 22, 1908, the compensation authority refused to renew the licence. After that refusal all that followed was machinery in consequence of and arising from it. I quite agree with the concluding sentence of my Lord's judgment.

BRAY J. I am of the same opinion.

I think we must (although we have to read the Acts of 1902 and 1904 together) first of all consider the Act of 1902. Now it was open to the Legislature when they fixed the period of twelve months by the Act of 1902 to enact that that period should commence to run from the date of the refusal of the licence by the licensing justices or from the time when the premises ceased to be licensed premises. Those dates might be, and nearly always would be, different. The one, that is the refusal of the licensing justices, might be in February, when the licensing sessions were held as provided by s. 14, sub-s. 1, of the Licensing

Act, 1902, or it might be at some later date in consequence of an adjournment, whereas the date of the premises ceasing to be licensed must always be a fixed day. It was open to the Legislature to consider what date they would select, and when they used the language of s. 28 of the Licensing Act, 1902, saying that "from within twelve months next preceding the date when the renewal of the licence has been refused," it seems to me that they expressed in the plainest possible language that they meant the twelve months to run from the date of the refusal by the justices to renew the licence, and not from the date when the premises ceased to be licensed.

If that be the construction of the Act of 1902, does it bear any different construction when read in conjunction with the Licensing Act, 1904?

The Act of 1904 altered the provisions with reference to the refusal of a licence, and in the case of redundancy it is provided that with regard to the refusal of the licence the power shall be exercised, not by the justices, but by quarter sessions; but again in the plainest language it is provided at the end of s. 1 of the Act of 1904 that "they," i.e., quarter sessions, "may subject to the payment of compensation under this Act refuse the renewal of any licence to which any such report relates." It is quite clear that the refusal by quarter sessions there referred to is a refusal of the renewal of the licence just as the refusal by licensing justices under the Act of 1902 was a refusal of the renewal of the licence. I have looked at the remaining provisions of the Licensing Act and Rules of 1904 to try if I can find any qualification of that enactment in s. 1, but I cannot find any qualification. It therefore seems to me that the twelve months must date from the refusal by the compensation authority to renew the licence, which in this case took place on May 22, 1908, and was therefore more than twelve months before the formation of the club.

Appeal allowed.

Solicitors for appellants: *Boulton, Sons & Sandeman.*
Solicitors for respondent: *Wontner & Sons.*

J. E. A.

1910
Jan. 17.

BLACKPOOL AND FLEETWOOD TRAMROAD COMPANY, APPELLANTS *v.* BISPHAM WITH NORBRECK URBAN DISTRICT COUNCIL, RESPONDENTS.

Justices—General District Rate—Non-payment—Application for Order for Payment—"Sufficient Cause" for Non-payment—Overpayment of previous Rates—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 256.

Part of a tramroad, the property of the appellants, lay within the district of the respondents, an urban district council, and another part lay within an adjacent district. In 1904 the appellants appealed against a general district rate for that adjacent district to which they had been assessed in respect of the full rateable value of the part of the tramroad within that district, the ground of appeal being that the tramroad was a railway within s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875, and that the appellants were therefore only liable to be assessed in the proportion of one fourth part of its annual value. In 1905 the respondents agreed that, if the appellants should pay the respondents' general district rates for 1905 and 1906, to be levied on an assessment in respect of the full rateable value of the part of the tramroad within the respondents' district, the respondents would, in the event of the then pending appeal being successful, repay to the appellants any money overpaid by them for those two rates. The appellants accordingly paid those rates. In 1909 the appeal was decided by the House of Lords in favour of the appellants. Subsequently the respondents applied to justices for an order, under s. 256 of the Public Health Act, 1875, for payment by the appellants of the respondents' general district rate for 1908. On the hearing of the application it was admitted that, in consequence of the House of Lords' decision, the respondents had in hand money overpaid by the appellants for the respondents' 1905 and 1906 rates more than sufficient to satisfy the 1908 rate. The justices made an order for payment:—

Held, that "sufficient cause for non-payment" within the meaning of s. 256 had been shewn, and that the order of the justices must be set aside.

CASE stated by justices for the county of Lancaster.

On September 23, 1909, a complaint was preferred by the collector and clerk to the Bispham with Norbreck Urban District Council (hereinafter called the respondents) under and by virtue of the Public Health Act, 1875, against the Blackpool and Fleetwood Tramroad Company, Limited (hereinafter called the appellants), for that the appellants, being duly assessed under and by virtue of the Public Health Act, 1875, in and by the general district rate dated June 4, 1908, in the sum of 447*l.* 8*s.*, had not paid the same, but had refused so to do.

Upon the hearing of the complaint the following facts were admitted or proved:—The said rate was duly laid. The appellants were duly assessed in and by the rate in the sum of 447*l.* 8*s.* The payment of the rate had been duly demanded from the appellants. The appellants had refused to pay the amount of the rate. The rate was still unpaid.

In October, 1904, there was an appeal by the appellants against the Thornton Urban District Council, claiming under s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875, to be rated as a railway, which appeal ultimately went to the House of Lords and was decided on April 1, 1909, in favour of the appellants being rated at one-fourth for the tramway portion: see *Thornton Urban District Council* v. *Blackpool and Fleetwood Tramroad Co.* (1)

Whilst the appeal was pending the respondents laid other rates in 1905 and 1906 amounting together to 1056*l.* 18*s.* 8*d.*, in which the appellants were rated in full for the tramroad portion, and not at one-fourth, amounting to 596*l.* 10*s.* 8*d.*

In August, 1905, the respondents discussed the position of the appellants in respect to paying the full rate, with the appeal to the Divisional Court by way of case stated then pending, and ultimately the respondents decided to refund any money overpaid by the appellants, should the appellants be successful in the matter of the appeal. Accordingly the respondents' clerk wrote the following letter to the appellants' secretary on August 25, 1905:—

"Dear Sir,—I enclose herewith demand note for poor and general district rates due from your company, with respect to assessment No. 197, and together amounting to the sum of 1023*l.* 18*s.* 1*d.* I am directed to state on behalf of this council that the matter of your appeal with reference to the rating of a portion of your undertaking for the purpose of the general district rate has been taken into consideration, and to inform you that, should you be successful in the matter of the said appeal, the proportioned amount would, if the same had been paid by your company, be refunded by this council."

(1) [1907] 1 K. B. 568; [1909] A. C. 264.

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The respondents contended:—

(*a*) That the appellants could not set off as against the 1908 rate any sum overpaid on the 1905 and 1906 rates.

(*b*) That if the appellants had any right of action against the respondents for the amount alleged to be overpaid on the 1905 and 1906 rates their remedy was in another Court.

(*c*) That what the justices had to adjudicate upon was whether the rate of 1908 was duly levied on the appellants, and whether the amount had been demanded, and whether payment was refused, which facts were all admitted, and that the justices had no alternative but to make an order for payment.

(*d*) That the respondents herein were not parties to the appeal of the Blackpool and Fleetwood Tramroad Company against the Thornton Urban District Council heard at Preston quarter sessions on October 21, 1904, which afterwards came, on a case stated by the Court of quarter sessions, before the Divisional Court on December 13, 1905, and before the Court of Appeal on January 21 and 23, 1907, and before the House of Lords on April 1, 1909.

The appellants contended:—

(*a*) That, relying on the respondents' decision and letter of August 25, 1905, they did not appeal against the 1905 and 1906 rates levied upon them by the respondents, but paid the amounts in full, namely, 1056*l.* 18*s.* 8*d.*, believing that, if the decision went in favour of the tramroad being rated at one-fourth, the amount overpaid, 460*l.* 8*s.*, would be refunded.

(*b*) That the amount overpaid to the respondents on the two rates was 460*l.* 8*s.*, being 13*l.* more than the amount of the rate charged by the respondents.

(*c*) That the respondents were overpaid the amount of the rate claimed by the overpaid payments in their hands upon the 1905 and 1906 rates.

The justices were of opinion that the rate claimed from the appellants was duly levied, that payment had been duly demanded, and that the same was then owing by the appellants to the respondents, and that they (the justices) had no alternative but to make an order for payment of the amount claimed. The justices, therefore, made an order for the appellants to pay

to the respondents 447*l.* 8*s.*, amount of rate, and 1*l.* 6*s.* 6*d.* costs, on or before January 31, 1910; and if default was made in payment it was ordered that the sum due should be levied by distress and sale of the appellants' goods.

The justices were further of opinion that the appellants were not entitled on the said proceedings to set off the amounts alleged to have been overpaid by the appellants to the respondents on the 1905 and 1906 rates as against the sum of 447*l.* 8*s.* owing on the general district rate dated June 4, 1908.

The question for the opinion of the Court was whether upon the above statement of facts the justices came to a correct determination in point of law, and, if not, what should be done in the premises.

W. C. Ryde, for the appellants. On the admitted facts it was a breach of faith for the respondents to issue a summons for an order for the payment of the 1908 rate. Relying on the undertaking given by the respondents in August, 1905, the appellants did not appeal against the 1905 and 1906 rates, as they otherwise would have done, but paid them in full. The effect of the decision of the House of Lords in *Thornton Urban District Council* v. *Blackpool and Fleetwood Tramroad Co.* (1) is that the appellants have overpaid the respondents in respect of those two rates, and the respondents have in their hands money belonging to the appellants exceeding the sum claimed by the respondents in respect of the 1908 rate. These facts constitute a "sufficient cause" within s. 256 of the Public Health Act, 1875 (2), why the justices should not make an order for payment. Those words are very wide and, intentionally, vague, the object being to enable

(1) [1909] A. C. 264.

(2) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 256: "If any person assessed to any rate made under this Act by any urban authority fails to pay the same when due and for the space of fourteen days after the same has been lawfully demanded in writing, ... any justice may summon the defaulter to appear before a Court of summary jurisdiction to show cause why the rate in arrear should not be paid; and if the defaulter fails to appear, or if no sufficient cause for non-payment is shown, the Court may make an order for payment of the same, and in default of compliance with such order, may by warrant cause the same to be levied by distress of the goods and chattels of the defaulter."

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the justices to exercise an equitable jurisdiction in regard to that which is a very strict and summary procedure. In the case of the recovery of poor rates there is no section applicable similar to s. 256, but, notwithstanding that, in *London and North Western Ry. Co.* v. *Bedford* (1) and in *Leicester Waterworks Co.* v. *Cropstone Overseers* (2) the Court stayed proceedings for the recovery of poor rates where the proceedings had been taken by the rating authority contrary to good faith. [He also referred to *Reg.* v. *Parker* (3) and *Dixon* v. *Blackpool and Fleetwood Tramroad Co.* (4)]

Gordon Hewart, for the respondents. The respondents' undertaking of August 25, 1905, was only intended to apply to the appeal to the Divisional Court then pending, which appeal was decided against the present appellants, though, it is true, the ultimate decision of the appeal in the House of Lords was in their favour. The respondents have, therefore, never admitted that the proceedings for the recovery of the 1908 rate were a breach of the undertaking, or that there was a sum due from them to the appellants which the latter were entitled to set off against the sum claimed. The respective contentions of the parties with regard to these matters were duly considered by the justices, and they, in the exercise of that discretion which the Act gives them, made the order for payment. That being so, this Court will not interfere, although, if the justices had refused to make an order, the Court might possibly in the circumstances have refused to grant a mandamus to them to do so. Assuming that the appellants have a set-off or counter-claim against the respondents in respect of the overpayment of the 1905 and 1906 rates, there is no case which decides that that is a sufficient cause within s. 256 for a refusal by the justices to issue a distress warrant for the later rate. The respondents' letter merely said that the amount overpaid would be refunded, whereas in *London and North Western Ry. Co.* v. *Bedford* (1) there was a definite agreement that the amount overpaid should be credited to the ratepayers on account of a future rate, and in *Leicester Waterworks Co.* v. *Cropstone Overseers* (2) the future rates were

(1) (1852) 17 Q. B. 978.
(2) (1875) 44 L. J. (M.C.) 92.
(3) (1857) 7 E. & B. 155.
(4) [1909] 1 K. B. 860.

referred to in the agreement for arbitration. Those cases are therefore distinguishable. The principle laid down in *Sandgate Local Board* v. *Pledge* (1) and *Reg.* v *Hannam* (2), that on the application for a distress warrant for non-payment of rates the duty of the justices is purely ministerial, has never been departed from and applies to this case. The proper course for the appellants to have adopted was to bring an action against the respondents on the undertaking. [*Westminster Corporation* v. *Army and Navy Auxiliary Co-operative Supply, Ld.* (3) was also cited.]

[LORD ALVERSTONE C.J. referred to *Sheffield Waterworks Co.* v. *Sheffield Corporation.* (4)]

LORD ALVERSTONE C.J. This case requires careful consideration, for I am most anxious not to say anything which could be regarded as in any way trenching upon the numerous authorities which have decided that, on an application for a distress warrant for the non-payment of rates, the justices have no power to take into consideration collateral matters which ought to be raised by means of an appeal against the rate. But, as I pointed out in *Dixon* v. *Blackpool and Fleetwood Tramroad Co.* (5) (where I referred to *Sheffield Waterworks Co.* v. *Sheffield Corporation* (4), in which case Mathew and A. L. Smith JJ. distinguished their previous decision in *Sandgate Local Board* v. *Pledge* (1)), the authorities shew that under s. 256 of the Public Health Act, 1875, the justices have, by reason of the words "if no sufficient cause for non-payment is shown," a somewhat larger discretion as to the issue of a distress warrant than they have in poor rate cases; though my decision would probably have been the same in this case if it had been a case of an application for a distress warrant for non-payment of a poor rate. It has been decided by the House of Lords that the appellants' tramroad is a railway within the meaning of s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875, and that the appellants are therefore entitled to be assessed in respect of their tramroad at one-fourth of its net

(1) (1885) 14 Q. B. D. 730.
(2) (1886) 34 W. R. 355.
(3) [1902] 2 K. B. 125.
(4) (1885) 55 L. J. (M.C.) 40.
(5) [1909] 1 K. B. 860.

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annual value; but it is admitted that in 1905 and 1906 they were rated on the full value of their property and that they have consequently overpaid the respondents to the amount of 460*l.* 8*s.* in respect of the rates for those two years, which is more than the sum demanded from them by the respondents for the 1908 rate in respect of which the justices have made an order for payment. If this had been a case in which the appellants had been attempting to set off disputed items, or to raise a claim in damages, against the rate in question, I should have doubted whether that would have been sufficient cause for a refusal by the justices to order payment; but in my opinion, apart from any question as to the undertaking given by the respondents when it is the fact that a rating authority has in hand money of a ratepayer which has admittedly been overpaid in respect of previous rates, and which money the rating authority ought not in equity to be allowed to keep, but which ought to be applied in payment of the debt due from the ratepayer for a subsequent rate, that is a sufficient cause for the justices to refuse to make an order for payment of that later rate.

It is contended on behalf of the respondents that the appellants' only remedy was by an action for damages for a breach of the respondents' undertaking, and it was further suggested that the undertaking only related to the result of the appeal in the Divisional Court. I do not agree with that view. In my opinion the undertaking was to repay any sum which should on the ultimate decision of the appeal be found to have been overpaid; but, as I have said, on the admitted facts of this case, quite apart from the undertaking, it was the duty of the justices to consider whether in the circumstances there was not sufficient cause for a refusal to make an order for payment. The justices never did consider that question, for they were of opinion that they had no alternative but to make the order. For these reasons I am of opinion that the appeal should be allowed and the order of the justices set aside.

BUCKNILL J. I agree. With regard to the undertaking I am of opinion that it cannot be read in the limited sense of applying only to the decision of the Divisional Court. As to

the other point, I think it was the duty of the justices to consider the real facts of the case as to the overpayment of the respondents and to say whether in their opinion those facts constituted a sufficient cause for refusing to make an order for the payment of the rate in question. The justices never did consider that question, but made the order because they thought that in the circumstances they had no alternative but to do so. That being so, their order cannot, in my opinion, stand.

BRAY J. I am of the same opinion. The respondents applied to the justices under s. 256 of the Public Health Act, 1875, for an order for the payment of a general district rate by the appellants. That section provides that the justices may make the order for payment "if no sufficient cause for non-payment is shown." It is clear that those words are not meaningless, for it was decided in *Dixon* v. *Blackpool and Fleetwood Tramroad Co.*(1), where the same words occurred in a local Act, that the justices were not bound to issue their distress warrant for the full amount of the rate, but were entitled to consider that a lesser sum was admittedly all that was really due from the ratepayer. In the present case, therefore, we have to consider what are the facts and whether they constitute a "sufficient cause" within s. 256. [The learned judge stated the facts as set out in the case, and continued:—] The only question with regard to the undertaking given by the respondents in their letter of August 25, 1905, is whether it was intended to refer only to the decision of the Divisional Court in the appeal from quarter sessions then pending, or whether it meant the ultimate decision of the appeal, in whatever Court it might be. I have not the slightest doubt that the latter meaning is the right one. Then the justices have found as a fact that the respondents have been overpaid by the appellants 460*l.* 8*s.*, that is, an amount exceeding that claimed in respect of the 1908 rate. In my opinion the respondents were bound in equity to apply that sum, which they had been overpaid, in payment of the 1908 rate, and in these circumstances I am of opinion that

(1) [1909] 1 K. B. 860.

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sufficient cause was shewn why no order for the payment of the 1908 rate should have been made by the justices.

Appeal allowed.

Solicitors for appellants: *Nicholson, Graham & Jones, for J. R. Gaulter, Fleetwood.*

Solicitors for respondents: *Forshaw & Parker, Preston.*

F. O. R.

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Jan. 24.

IN THE MATTER OF AN ARBITRATION BETWEEN THE ROYAL MAIL STEAM PACKET COMPANY, LIMITED AND THE RIVER PLATE STEAMSHIP COMPANY, LIMITED.

Ship — Charterparty — Lay Days—Exceptions — Despatch Money — "Each running day saved."

A charterparty provided that twenty running days should be allowed for the discharge of the cargo, "holidays and time between 1 P.M. Saturdays and 7 A.M. Mondays excepted," and that the shipowners should pay despatch money "for each running day saved." The discharge of the ship took 12 days 13 hours and was completed at 10 A.M. on Saturday, February 27. If the whole period of time allowed by the charterparty had been taken for the discharge, the lay days, by reason of the excepted time, would not have expired until 9 A.M. on March 10, or 10 days 23 hours after the discharge was actually completed. The shipowners contended that despatch money was only payable in respect of the difference between 20 days and 12 days 13 hours, i.e., 7 days 11 hours:—

Held, that the charterers were entitled to despatch money in respect of the subsequent time between 1 P.M. on Saturdays and 7 A.M. on Mondays included in the lay days, the same being running days "saved" within the meaning of the charterparty, and that despatch money was therefore payable in respect of 10 days 23 hours.

The Glendevon, [1893] P. 269, and *Nelson & Sons* v. *Nelson Line, Liverpool*, [1907] 2 K. B. 705, distinguished.

AWARD in an arbitration stated in the form of a special case pursuant to s. 7 of the Arbitration Act, 1889.

By a charterparty dated November 19, 1908, the Royal Mail Steam Packet Company, hereinafter referred to as the charterers, chartered the steamship *River Plate* from the River Plate

Steamship Company, Limited, hereinafter referred to as the shipowners. The charterparty provided that the *River Plate* should proceed first to Hull and then to London and at those ports load such lawful cargo as the charterers might send alongside for shipment, and being so loaded should proceed to Monte Video, Buenos Aires, and Rosario in the order named and there deliver her cargo. Clause 8 of the charterparty, so far as material, was as follows: "Fourteen running days from 7 o'clock A.M. after the vessel is reported at custom house and in berth . . . . and in every respect ready to load at each port shall be allowed the charterers (holidays and time between 1 P.M. Saturdays and 7 A.M. Mondays excepted) for the loading of the cargo, and all days on demurrage over and above the said lay days shall be paid for at the rate of 33*l.* per running day, and twenty running days, from 7 o'clock A.M. after the vessel is reported at the custom house and in berth and in every respect ready to discharge at each port, shall be allowed charterers for the discharging of the cargo (holidays and time between 1 P.M. Saturdays and 7 A.M. Mondays excepted), and all or any days on demurrage over and above the said lay days shall be paid for at the rate of 33*l.* per running day; the owners of the ship to pay 10*l.* per day despatch money for each running day saved. Parts of days to count as parts of days, and demurrage or despatch money to be paid pro rata."

The steamer, having duly loaded a part cargo at Hull and having completed her cargo in London, proceeded to the River Plate and discharged her cargo at Monte Video, Buenos Aires, and Rosario. On arriving at Rosario the steamer had under the terms of the charterparty 16 days 3 hours left in which to discharge, and in the computation of this period of time holidays and the time between 1 P.M. on Saturdays and 7 A.M. on Mondays were not to be taken into account. The lay days at Rosario began to run at 7 A.M. on Monday, February 15, 1909, and the cargo was finally discharged at 10 A.M. on Saturday, February 27, 1909. Excluding the time after 1 P.M. on Saturday, February 20, Sunday, February 21, and also February 22 and 23, which were holidays, the time occupied in the discharge and chargeable in the computation of lay days under the

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charterparty was 8 days 16 hours, thus leaving 7 days 11 hours to make the 16 days 3 hours unconsumed. If the charterers had detained the steamer during the whole period of her lay days, namely, for the above-mentioned 7 days 11 hours calculated in accordance with the terms of the charterparty, the lay days would have expired on March 10, 1909, at 9 A.M., or 10 days 23 hours after the time when the discharge was actually completed, as shewn by the following tabulated statement:—

									Occupied. Days.	Occupied. Hours.	Despatch. Days.	Despatch. Hours.
10 A.M.,	Sat.,	Feb.	27,	to midnight,	Sat.,	Feb.	27		0	3	0	14
Midnight,	,,	,,	27,	,,	Sun.,	,,	28		0	0	1	0
,,	Sun.,	,,	28,	,,	Mon.,	Mar.	1		0	17	1	0
,,	Mon.,	Mar.	1,	,,	Tues.,	,,	2		1	0	1	0
,,	Tues.,	,,	2,	,,	Wed.,	,,	3		1	0	1	0
,,	Wed.,	,,	3,	,,	Thurs.,	,,	4		1	0	1	0
,,	Thurs.,	,,	4,	,,	Fri.,	,,	5		1	0	1	0
,,	Fri.,	,,	5,	,,	Sat.,	,,	6		0	13	1	0
,,	Sat.,	,,	6,	,,	Sun.,	,,	7		0	0	1	0
,,	Sun.,	,,	7,	,,	Mon.,	,,	8		0	17	1	0
,,	Mon.,	,,	8,	,,	Tues.,	,,	9		1	0	1	0
,,	Tues.,	,,	9,	to 9 A.M.	Wed.,	,,	10		0	9	0	9
									7	11	10	23

The question at issue between the parties was whether the charterers were entitled to be paid despatch money for 7 days 11 hours or for 10 days 23 hours

The umpire was of opinion that the charterers were entitled to despatch money in respect of the 10 days 23 hours claimed by them.

Scrutton, K.C., and *Leck*, for the charterers. By clause 8 of the charterparty the owners are to pay despatch money "for each running day saved." That means saved to the shipowner: *Laing* v. *Hollway* (1); and a day is none the less saved to the shipowners though it is a day on which the work of discharging would not have been carried on. By reason of the charterers' despatch in discharging this vessel she was enabled to leave the port 10 days 23 hours sooner than she would have done if the full time allowed by the charterparty had been occupied in discharging. The shipowners are liable to pay despatch money for all those days. *The Glendevon* (2), which will be relied on by the shipowners, is distinguishable, for there the charterparty did

(1) (1878) 3 Q. B. D. 437. (2) [1893] P. 269.

not contain the words "running day." In *Nelson & Sons* v. *Nelson Line, Liverpool* (1) the decision of the Court of Appeal that despatch money was not payable in respect of a Sunday or holiday turned on the particular words of the charterparty, "each clear day saved in loading." That case went to the House of Lords (2), but this question was not there dealt with.

Bailhache, K.C., and *D. Stephens*, for the shipowners. The charterers are only entitled to be paid despatch money for 7 days 11 hours. They seek to extend the time by adding on days which are excepted from the lay days, but that contention ignores the language of clause 8, which says that despatch money is to be paid "for each running day saved." The expression "running days" means a series of consecutive days as distinguished from working days, that is, days on which work is actually done. When a vessel has come on demurrage the charterer does not get the benefit of the days excepted from the loading time, and as in this clause the same words are used with regard to the despatch money as in the case of demurrage, namely, running day, it follows that the charterers cannot for the purpose of calculating the despatch money have the benefit of days which are within the exceptions. In *The Glendevon* (3) the charterers had made their calculation in exactly the same manner as the charterers have done in this case, but their contention failed, and *The Glendevon* (3) is a clear authority in favour of the shipowners and is decisive of this case. *The Glendevon* (3) was held by Vaughan Williams and Buckley L.JJ. in the *Nelson Case* (1) to have been correctly decided, and the decision in the *Nelson Case* (1) also supports the shipowner. *Laing* v. *Hollway* (4) is distinguishable, for the decision turned on the language of the charterparty in question, which was quite different from the words in this charterparty, and the expressions used by Bramwell L.J. as to the meaning of "time saved" were merely obiter.

Leck in reply. Although clause 8 says that both demurrage and despatch money are to be paid "per running day," the shipowners seek to give a different meaning to those words according

(1) [1907] 2 K. B. 705.
(2) [1908] A. C. 108.
(3) [1893] P. 269.
(4) 3 Q. B. D. 437.

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to whether demurrage or despatch money is being dealt with, for they contend that demurrage is payable for Sundays and holidays, but that in calculating despatch money those days must be ignored.

BRAY J. The question in this case arises under a clause in a charterparty which provides that twenty running days shall be allowed for the discharge of the cargo, holidays and time between 1 P.M. on Saturdays and 7 A.M. on Mondays excepted, and that the owners shall pay 10*l.* per day despatch money "for each running day saved." When the ship arrived at Rosario there were 16 days 3 hours left of the lay days. The discharge began there at 7 A.M. on Monday, February 15, and excluding holidays and the week-end periods the lay days would not expire until 9 A.M. on March 10. The actual time occupied in the discharge at Rosario was 8 days 16 hours, and deducting that from 16 days 3 hours there is left 7 days 11 hours, and the contention of the owners is that the charterers are only entitled to despatch money for those 7 days 11 hours. On the other hand the charterers contend that despatch money is payable in respect of the whole of the period between 10 A.M. on February 27, when the discharge was completed, and 9 A.M. on March 10, when the lay days expired.

The only clause in the charterparty which it is necessary to consider is clause 8. [The learned judge read the clause, and continued :—] The first point to consider is what is the meaning of the word "saved" in that clause. Apart from authority I should have come to the conclusion that the contention of the charterers is right, namely, that "saved" means saved to the shipowners, and that the charterers have in the circumstances of this case saved the owners ten days because the owners got the ship away ten days sooner than they would have done if the whole of the lay days had been occupied in the discharge. But I have to consider whether there is any authority which prevents my deciding the case in accordance with that view.

In *Laing* v. *Hollway* (1) the charterparty contained the words "Despatch money 10*s.* per hour on any time saved in loading

(1) 3 Q. B. D. 437.

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or for discharging." I do not think it can be said that those words are quite the same as the words in this charter-party, and it is always rather a dangerous thing to say that a decision on certain words in one case governs another case in which the words are slightly different. I must therefore see whether any principle was laid down in *Laing* v. *Hollway* (1) which is decisive of the present case. In the course of the considered judgment of the Court which was delivered by Bramwell L.J. he said: "Then what is the meaning of 'time saved in loading or discharging'? The literal meaning we suppose would be doing those things in less time than they might be done in with ordinary despatch, i.e., if ordinary despatch with the ordinary number of hands and ordinary diligence would load and unload in 20 days or 240 hours, then extraordinary despatch, extraordinary number of hands, and extraordinary diligence in doing those things in 15 days or 180 hours, the difference, five days or 60 hours, is time saved. Because strictly speaking time is not saved in doing a thing by working 24 hours round instead of 12 in one day and 12 another; 24 have been consumed in each case. Time is saved by getting from A. to B. if a man runs in one hour instead of walking in two. But nobody suggests that this is the meaning. It is admitted on both sides and is clear that 'time saved' means if the ship is ready earlier than she would be if the charterers worked up to their maximum obligation only, all the time by which she is the sooner ready is time saved within the meaning of the charterparty." It is admitted by Mr. Bailhache that if that passage was necessary for the decision of the case then before the Court it is a decision against the contention of the owners in this case. I think that he is perhaps right in saying that it was not necessary for the decision, and in view, also, of the fact that the Court was there construing words which are not the same as those which I have to construe, I do not propose to decide this case on the footing that I am bound by that passage in the judgment in *Laing* v. *Hollway*. (1)

The next case to which I must refer is *The Glendevon* (2), where the charterparty provided that the cargo was to be discharged at

(1) 3 Q. B. D. 437. (2) [1893] P. 269.

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the rate of 200 tons per day, weather permitting (Sundays and fête days excepted), according to the custom of the port of discharge, "and if sooner discharged to pay at the rate of 8*s.* 4*d.* per hour for every hour saved." It is important to see what was the proposition which Jeune P. put before himself as necessary for the decision of the case. It appears from the note on p. 270 of the report that the charterers' contention was that the time saved ought to include a fête day and a Sunday which came after the discharge had been completed but before the lay days had expired. The President put it in this way: "The question is whether despatch is to be counted in respect of the 24 hours of December 8, which was a fête day, and the 24 hours of December 11, which was a Sunday, that is 48 hours in all at 8*s.* 4*d.* per hour, making the 20*l.* claimed by the defendants by way of set-off against freight." It is to be observed that he did not differ from the meaning of the word "saved" as given in *Laing* v. *Hollway* (1), but the question was whether despatch money was to be paid in respect of the whole time saved, or the time other than Sundays and fête days. Then the President quoted passages from the judgment of *Laing* v. *Hollway* (1), where Bramwell L.J. said "The owner would sail away by what has happened 216 hours sooner than he would have done but for the defendant's despatch," and "It was admitted by the plaintiff that the demurrage would be payable on this footing, then why not the despatch money?" and the President said "I do not think that either of these phrases really lend themselves to the arguments put forward by the appellants in this case," which was true, because in *The Glendevon* (2) the demurrage clause in the charterparty was entirely distinct from the despatch clause. The real ground of the decision in *The Glendevon* (2) is, I think, contained in the following passage in the judgment of the President: "But the argument which the counsel for the respondents has put as regards the other exception in the clause appears to me to be unanswerable. They point out that days during which the weather does not permit discharge stand on the same footing as regards the charterer's right as Sundays and fête days; that is to say,

(1) 3 Q. B. D. 437. (2) [1893] P. 269.

the charterer need not discharge on Sundays and fête days, and need not discharge if the weather does not permit on other days, but if Sundays and fête days are to be reckoned in as time saved for the purpose of the payment of despatch money, then the days during which the weather does not permit discharge ought to stand on the same footing. I confess I am unable to see any answer to that argument, and the results would be so extraordinary as to be unintelligible. It would come to this, that after the ship was discharged the charterer would have the right to say that on a large number of days, it might be even weeks or months, he was prevented by the weather from discharging, and therefore he was entitled to add these in as days of twenty-four hours, for each hour of which he was entitled to have 8*s.* 4*d.* That is an absurdity." Having regard to the fact that the language of the charterparty in *The Glendevon* (1) was in many respects different from the language of this charterparty, I do not think that the decision in that case is conclusive of the present case.

The only other case which I have to consider is *Nelson & Sons* v. *Nelson Line, Liverpool* (2), in which case the charterparty contained the words "For each clear day saved in loading the charterers shall be paid or allowed by the owners the sum of 20*l.*" The charterparty allowed seven weather working days (Sundays and holidays excepted) for loading. Two of the days on which the loading was done were in fact holidays, and one of the questions in the case was whether the charterers were entitled to despatch money in respect of days saved which were Sundays or holidays. On this point Vaughan Williams L.J. merely stated that he agreed with the judgment of Buckley L.J., to which I will refer in a moment. Fletcher Moulton L.J. delivered a dissenting judgment in which he stated that in his opinion *The Glendevon* (1) could not be supported, both on the ground that it was wrong in law and also that the opposite principle had been laid down in *Laing* v. *Hollway.* (3) I must confess that the judgment of Fletcher Moulton L.J. strongly commends itself to me and that I

(1) [1893] P. 269. (2) [1907] 2 K. B. 705.
(3) 3 Q. B. D. 437.

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agree with the reasons given by him. It is therefore important to consider what bearing the judgment of Buckley L.J. has upon the question involved in the present case. Referring to the argument put forward on behalf of the charterers, he says: "They say, and quite truly, that the departure of the ship has been accelerated not by three days, but by four, because she got the benefit of Sunday; that the charterers might have occupied until the end of the next Wednesday in loading; and that, had they done so, the ship would have left four days later than in fact she did. If this contract had been that the charterers should have so much a day for each day saved to the ship, this would have been right, but it does not so provide. The provision is that they shall have so much for each clear day saved in loading. The respondents argue, and quite rightly and pertinently, I think, in the case in debate, that a man cannot save that which he never had. But according to the common use of the English language, that is not quite accurate, in the sense that it is not exhaustive. I can properly speak of some one as having saved me trouble. The fallacy of the appellants' argument may be indicated by following up this suggestion. By finishing their loading on the Saturday the charterers saved the shipowners delay, but there was no day saved in loading so far as the Sunday was concerned. The relevant words are 'seven days to be allowed for loading,' and 'for each clear day saved in loading' the charterers shall be paid. In this language no trace is to be found of saving delay to the ship. The payment is to be made for any saving effected in the seven days allowed for loading." Buckley L.J. then referred to *The Glendevon* (1), which he thought was rightly decided, and he distinguished *Laing* v. *Hollway* (2) on the ground that in that case the word "saved" clearly meant saved to the shipowner, whereas in the *Nelson Case* (3) the express language of the charterparty pointed to the saving of the charterers' loading days. So far, therefore, from the judgment of Buckley L.J. being in favour of the shipowners in this case, it seems to me it is against them, and applying that reasoning to the language of this charterparty I think the word

(1) [1893] P. 269. (2) 3 Q. B. D. 437.
(3) [1907] 2 K. B. 705.

"saved" must be construed as meaning saved to the shipowner, as it was construed in *Laing* v. *Hollway*. (1)

I am of opinion that the words "running days" in clause 8 mean consecutive days, and that it is not correct to say that, because the clause says that holidays and week-ends are for the purpose of loading and discharging to be excepted from the running days, that is a definition of "running day." It is clear that for the purpose of demurrage the running days include Sundays and week-ends, and I think that for the purpose of calculating despatch money they must also be counted, as they are days saved to the shipowners.

For these reasons I am of opinion that my judgment must be given in favour of the charterers.

Judgment accordingly.

Solicitors for charterers: *Holman, Birdwood & Co.*
Solicitor for shipowners: *A. W. Kingcombe.*

F. O. R.

HELLWIG *v.* MITCHELL.

Defamation—Slander—Words actionable per se—Innuendo—Criminal Offence—Punishment—Liability to Summary Arrest.

Words imputing that the plaintiff has been guilty of a criminal offence, punishable by fine only, but which involves a liability to summary arrest, will not support an action for slander without special damage.

CASE set down in the special paper for argument as to whether the statement of claim disclosed any cause of action.

The statement of claim was as follows:

"(1.) The plaintiff is a hairdresser carrying on business at 37, Walbrook, in the city of London, and residing at No. 17, Cotswold Road, Westcliff, in the county of Essex. The defendant is the manager of the Palace Hotel, Southend, in the said county of Essex.

(1) 3 Q. B. D. 437.

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"(2.) On November 1, 1909, at the aforesaid Palace Hotel the defendant falsely and maliciously spoke and published of and concerning the plaintiff to one Aubrey Bagnald, to one Frank Bagnald, and to divers other persons then present in the said hotel, but whose names are not known to the plaintiff, the words following, that is to say:—'I cannot have you in here; you were on the premises last night with a crowd, and you behaved yourself in a disorderly manner and you had to be turned out.' Upon the plaintiff protesting that the defendant had made a mistake and that he (the plaintiff) was not in Southend on the previous evening, the defendant further said in the aforesaid circumstances:—'Oh, no, I have not made a mistake, and there are plenty of people here now who saw you and the disorderly way in which you behaved; you have to go out at once; and if you don't go I shall call in the police, and have you turned out.'

"(3.) By the said words the defendant meant and was understood to mean that the plaintiff had been guilty of disorderly conduct, of committing breaches of the peace and refusing to quit licensed premises, having thereby committed criminal offences, and that he was not a fit person to associate with respectable people and was incapable of behaving in a rational or decent manner.

"(4.) By reason of the premises the plaintiff has been held up to public ridicule, odium, and contempt, and has suffered damage to his credit and reputation.

"The plaintiff claims 250*l.* damages."

Shearman, *K.C.*, and *H. Dobb*, for the plaintiff. Any words which impute that a person has committed an offence for which he may be made to suffer corporally by imprisonment are actionable without proof of special damage: *Webb* v. *Beavan* (1); Com. Dig. tit. Action on the Case for Defamation, D. 5 and 9. The words set out in the statement of claim are capable of meaning that the plaintiff had taken part in an unlawful assembly, or that he had committed an offence under s. 12 of the Licensing Act, 1872, of being guilty, while drunk, of disorderly behaviour in a public place, which by s. 1 of the Licensing

(1) (1883) 11 Q. B. D. 609.

Act, 1902, includes licensed premises. In either of these cases he would be liable to punishment by imprisonment. But even if the words are not capable of bearing these meanings, they do bear the meaning alleged in the innuendo, namely, that the plaintiff had been guilty of disorderly conduct in licensed premises and of committing breaches of the peace. Disorderly conduct in licensed premises renders the offender liable to be forcibly removed: see Licensing Act, 1872, s. 18; and a person committing a breach of the peace may be apprehended either by a constable or by a private individual in whose view it is committed. Although these offences would not render the offender liable to imprisonment as a punishment, yet a person who is forcibly removed from licensed premises or is apprehended for a breach of the peace suffers corporally in the sense in which those words are used in connection with the law as to defamation by words spoken. [*Michael* v. *Spiers & Pond, Ld.* (1) was also cited.]

Hohler, K.C., and *F. Burrows*, for the defendant. It is not suggested in the innuendo that the words mean that the plaintiff had been a party to an unlawful assembly, or that he had been drunk and disorderly while on licensed premises, and the words are not capable of bearing either of those meanings. The rule as to words being actionable without proof of special damage if they impute the commission of a criminal offence is confined to cases where the offence is one punishable either on indictment or on summary conviction by imprisonment. The contention that the rule includes offences which, though punishable by fine only, render the offender liable to summary arrest or detention is one for which no authority can be found. In the cases of a breach of the peace or an offence under s. 18 of the Licensing Act, 1872, the arrest is not a punishment, but a means of preventing a repetition of the offence, and the offender by being arrested does not suffer corporally. Otherwise, any imputation which involved a liability to temporary detention, quite apart from the commission of an offence, would be actionable without proof of special damage. For example, a person trespassing on realty may be removed by the use of reasonable force, and that

(1) (1909) 25 Times L. R. 740.

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would constitute an arrest in law. So also many railway by-laws confer a right of arrest, though the punishment is by fine only. Although Pollock B. in his judgment in *Webb* v. *Beavan* (1) did not use the word "punishment," the context shews that by "suffer corporally" he meant punishment by imprisonment. The judgment of A. T. Lawrence J. in *Michael* v. *Spiers & Pond, Ld.* (2) supports the view that imprisonment otherwise than as punishment is not sufficient. [*Simmons* v. *Mitchell* (3), *Onslow* v. *Horne* (4), *Feise* v. *Linder* (5), and *Sealey* v. *Tandy* (6) were also referred to.]

H. Dobb in reply. It is a sufficient innuendo if it is alleged, as here, that the words meant that the plaintiff had committed a criminal offence. It is immaterial that specific criminal offences are also mentioned. It would be open to a jury on this statement of claim to say that the words meant that the plaintiff had been a party to an unlawful assembly or had committed an offence under s. 12 of the Licensing Act, 1872.

BRAY J. This case is by no means free from doubt. The question is whether the statement of claim discloses any actionable wrong. In the absence of special damage slander is only actionable in certain cases, one of which is where the words impute the commission of a criminal offence punishable by imprisonment. The first point taken on behalf of the plaintiff is that the words alleged in the statement of claim are capable of meaning that the plaintiff was a party to an unlawful assembly, which is an offence punishable with imprisonment. I do not think that without some special innuendo and special evidence the words convey an imputation of that sort, but it may be that, if there had been a special innuendo pleaded, that the words meant that the plaintiff had been a party to an unlawful assembly, I might have thought that there was a question for the jury. The actual innuendo pleaded in the statement of claim does not, in my opinion, allege that the plaintiff had been guilty of being a party to an unlawful assembly.

(1) 11 Q. B. D. 609.
(2) 25 Times L. R. 740.
(3) (1880) 6 App. Cas. 156.
(4) (1771) 2 W. Bl. 750.
(5) (1803) 3 Bos. & P. 372.
(6) [1902] 1 K. B. 296.

It was next said that the slander imputed to the plaintiff that he had been guilty of being drunk and disorderly, which is an offence punishable with imprisonment. But there is not a word in the slander imputing drunkenness to the plaintiff, and the words are not capable of bearing that meaning, nor is that meaning alleged in the innuendo. Therefore both those points fail.

Lastly it was contended that the words are capable of bearing the meaning alleged, namely, that the plaintiff had been guilty of disorderly conduct and of committing breaches of the peace, and it was said that a person who commits a breach of the peace may be arrested either by a private individual or by a constable. That is true, but the offence is not punishable by imprisonment. It was contended, however, that the rule does not require that the criminal offence should be one punishable by imprisonment, and that it is sufficient if the offence be one which renders the offender liable to summary arrest and detention. This is not a question of principle, but of judge-made law, and therefore I must look at the authorities to see how far they support this contention. The first case to which I will refer is *Webb* v. *Beavan* (1), in which the Court had to consider the question whether it is necessary to allege that the words impute an indictable offence, and it was held that it was not necessary. Pollock B. in giving judgment said: "The expression 'indictable offence' seems to have crept into the text-books, but I think the passages in Comyns' Digest are conclusive to shew that words which impute any criminal offence are actionable per se. The distinction seems a natural one, that words imputing that the plaintiff has rendered himself liable to the mere infliction of a fine are not slanderous, but that it is slanderous to say that he has done something for which he can be made to suffer corporally." Those last words are, undoubtedly, somewhat ambiguous and may be wide enough to include an offence which, though not punishable by imprisonment, renders the offender liable to arrest. The judgment of Lopes J. in *Webb* v. *Beavan* (1) does not carry the matter any further. The next case is *Michael* v. *Spiers & Pond, Ld.* (2), where it was contended by counsel for the

(1) 11 Q. B. D. 609. (2) 25 Times L. R. 740.

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plaintiff that "the joint effect of s. 12 of the Licensing Act, 1872, and s. 5 of the Summary Jurisdiction Act, 1879, was to make drunkenness on licensed premises an offence which exposed the person committing it to punishment corporally. The plaintiff under s. 1 of the Licensing Act, 1902, was liable to be dealt with corporally on the spot, and therefore this was a slander which was actionable per se." It appears, therefore, that the argument which has been raised here was also raised in *Michael* v. *Spiers & Pond, Ld.* (1), but A. T. Lawrence J. apparently did not find it necessary to decide the point, for he held that there was no imputation of an offence within s. 1 of the Licensing Act, 1902, but he used these words: "As, therefore, there is no imputation of an indictable offence or of an offence for which a person can be made to suffer corporally by way of punishment, I think special damage is necessary." That is a dictum that the corporal suffering must be by way of punishment. I cannot find in the books a trace of authority for saying that words imputing that the plaintiff has done an act for which he may be arrested, but which is only punishable by a fine, are actionable without proof of special damage, or that a mere liability to arrest is sufficient to make the crime one for which the offender can be said to suffer corporally. Strictly speaking, it is incorrect to say that a person who commits a breach of the peace can be made to suffer corporally. The arrest in that case is not a punishment; it is merely a method of preventing the continuing of the offence.

I am of opinion that it is not desirable to extend the list of actionable wrongs, and for the reasons which I have given I come to the conclusion that the statement of claim discloses no actionable wrong, and the action must therefore be dismissed with costs.

Judgment accordingly.

Solicitors for plaintiff: *Sparks & Russell.*

Solicitors for defendant: *Sismey & Cook, for B. & F. Tolhurst & Cox, Southend-on-Sea.*

(1) 25 Times L. R. 740.

F. O. R.

PARKINSON *v.* GARSTANG AND KNOTT END RAILWAY COMPANY.

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Railway Company—Level Crossing—Obligation to maintain Gates—Straying Horse—Railways Clauses Consolidation Act, 1845 (8 *&* 9 *Vict. c.* 20), *ss.* 47, 61.

Sect. 61 of the Railways Clauses Consolidation Act, 1845, provides that if a railway shall cross a highway, which is a footway, on the level, the company shall erect and maintain good and sufficient gates or stiles on each side of the railway where the highway shall communicate therewith.

The plaintiff's horse, without any negligence on the part of the plaintiff, strayed on to a public footpath, which the defendants' railway crossed on the level, and passed through a gate, erected by the defendants, on to the railway and was killed by a passing train. The fastening of the gate was defective:—

Held, that the defendants had failed to maintain a good or sufficient gate as required by s. 61; that the defendants' duty under the section was not a duty owed only to persons lawfully using the footpath; and that the defendants were liable to the plaintiff for the loss of his horse.

Appeal from the Blackpool County Court.

The action was brought to recover damages for the loss of a horse, the property of the plaintiff, on September 19, 1908. The horse, which had been put out to graze in a field of which the plaintiff was tenant, escaped from the field through the gate and got on to a road which, at a distance of about three hundred yards from the plaintiff's field, crossed the defendants' railway by a level crossing. The railway was separated from the adjoining land by a wire fence, and at the level crossing the defendants had placed iron gates across the road. The plaintiff's horse strayed along the road and passed through the gates on to the railway and was struck by a passing train and killed. The road was an accommodation road and also a public footpath. The plaintiff was not the owner or occupier of land adjoining the railway. The evidence shewed that the gates had been put up in 1908, and that there was a difficulty in keeping them closed owing to the posts having been pulled apart by the wire fence. There was also evidence that the gate into the plaintiff's field was out of repair.

The county court judge found as facts that the road was a

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highway for foot passengers; that the railway gates were not sufficient at the time of the accident; that the plaintiff's horse was straying on the public footpath; and that the horse strayed in consequence of the insufficiency of the plaintiff's gate to keep the horse in his field where it was grazing. He held that there was no obligation on the defendants to fence the railway against horses straying on the public footpath, and he gave judgment for the defendants.

The plaintiff appealed.

F. Watt, for the plaintiff. On the findings of fact by the county court judge the plaintiff is entitled to judgment. The accident was due to the negligence of the defendants in failing to maintain a good and sufficient gate at the level crossing as required by s. 61 of the Railways Clauses Consolidation Act, 1845 (1): *Ellis* v. *London and South Western Ry. Co.* (2); and it is no answer to say that the horse was straying: *Fawcett* v. *York and North Midland Ry. Co.* (3); *Dickinson* v. *London and North Western Ry. Co.* (4); *Charman* v. *South Eastern Ry. Co.* (5); and, therefore, the finding of the county court judge that the plaintiff's horse strayed in consequence of the insufficiency of the gate into the plaintiff's field is immaterial and may be disregarded. [He also referred to *Williams* v. *Great Western Ry. Co.* (6) and *Cooke* v. *Midland Great Western Railway of Ireland.* (7)]

[PHILLIMORE J. referred to *Hadwell* v. *Righton.* (8)]

A. B. Shaw, for the defendants. The judgment of the county court judge was right. The plaintiff chose to put a horse in a

(1) Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 61: "If the railway shall cross any highway other than a public carriage way on the level, the company shall at their own expense make and at all times maintain convenient ascents and descents and other convenient approaches, with handrails or other fences, and shall, if such highway be a bridleway, erect and at all times maintain good and sufficient gates, and if the same shall be a footway, good and sufficient gates or stiles, on each side of the railway where the highway shall communicate therewith."

(2) (1857) 2 H. & N. 424.

(3) (1851) 16 Q. B. 610.

(4) (1866) H. & R. 399.

(5) (1888) 21 Q. B. D. 524.

(6) (1874) L. R. 9 Ex. 157.

(7) [1909] A. C. 229.

(8) [1907] 2 K. B. 345.

field in which the gate was defective, and he therefore took the risk of his horse escaping through that gate, even though the duty to repair the gate rested not on him, but on his landlord. There was evidence that the plaintiff knew that there was a possibility of the railway company's gate being left open, and by reason of that knowledge the plaintiff's negligence in the matter of his own gate is sufficiently connected with the accident to make it contributory negligence. But even assuming there was no contributory negligence on the part of the plaintiff, the action cannot be successfully maintained. The road by which the horse got on to the railway was an accommodation road with a public footpath over it. In so far as it was an accommodation road the defendants' duty was, under s. 68 of the Railways Clauses Consolidation Act, 1845, to make and maintain gates to prevent the cattle of the owners or occupiers of the adjoining lands from straying, and it has been decided that the duty of a railway company under that section is only towards the owners and occupiers of the adjoining close: *Ricketts* v. *East and West India Docks and Birmingham Junction Ry. Co.* (1); *Manchester, Sheffield, and Lincolnshire Ry. Co.* v. *Wallis.* (2) The latter is a strong case, because, although the horse in question was straying on a public road, the jury negatived any negligence on the part of the plaintiff, but it was held that the plaintiff, not being the owner or occupier of the road adjoining the railway, had no cause of action against the railway company for the injury to the horse sustained through the neglect of the company to comply with the provisions of s. 68. In the present case the plaintiff was not the owner or occupier of land adjoining the railway, and therefore the defendants owed him no duty under s. 68. In so far as the road was a public footpath the defendants' duty is, under s. 61, to maintain good and sufficient gates or stiles on each side of the railway. The obligation is, however, limited to providing gates or stiles which are adequate for the purposes of the public using the way as a footway. The defendants owe no duty under s. 61 to the owner of a straying horse which has no right to be upon the footway. A gate which fulfilled all the obligations of s. 61 might nevertheless be quite

(1) (1852) 12 C. B. 160. (2) (1854) 14 C. B. 213.

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inadequate to keep horses or cattle off the railway. There does not appear to have been any decision on s. 61, but applying the principle laid down in the decisions on s. 68, the obligation of the railway company under s. 61 with regard to footways must be limited strictly to members of the public lawfully using the way as a footway; and as the authorities shew that the owner of a straying horse, who is not the owner or occupier of land adjoining the railway, has no right to complain of a breach of the statutory duty imposed on railway companies by s. 68, so he is equally debarred from making a railway company liable for injury sustained by a straying horse in consequence of the company's neglect to perform its duties under s. 61 in respect of a footway.

Fawcett v. *York and North Midland Ry. Co.* (1) and the other cases cited for the plaintiff were all decided under s. 47, which deals with level crossings over turnpike roads or public carriage roads. The language of that section is far wider than that of ss. 61 and 68, and the duties imposed on the railway company are more onerous, for s. 47 contains an express provision that the railway company shall keep the gates closed at all times except when animals or carriages passing along the road have to cross the railway, and accordingly it was held in *Fawcett* v. *York and North Midland Ry. Co.* (1) that s. 47 imposes an obligation on the railway company to keep the gates closed as against everything, whether straying or passing. The distinction between s. 47 and s. 68, namely, that s. 47 creates a duty towards all the public and s. 68 creates a duty towards a limited class only, was recognized in *Manchester, Sheffield, and Lincolnshire Ry. Co.* v. *Wallis* (2) and in *Charman* v. *South Eastern Ry. Co.* (3), and the same distinction exists as between s. 47 and s. 61.

PHILLIMORE J. The first question which we have to consider in this case is whether, assuming that the defendants have been guilty of negligence or a breach of a statutory duty, the plaintiff was guilty of contributory negligence. If the plaintiff knew, or ought to have known, that the gate on to the railway was in such

(1) 16 Q. B. 610. (2) 14 C. B. 213.
(3) 21 Q. B. D. 524.

a condition that a horse could get through it on to the railway, and if the plaintiff also negligently permitted his own gate to be in a defective condition so that his horse could escape from the field into the lane which would ultimately lead the horse to the railway, the plaintiff would be, in my opinion, guilty of contributory negligence. The county court judge has found as a fact that the plaintiff's horse strayed in consequence of the insufficiency of the plaintiff's gate to keep the horse in his field where it was grazing, but he has not found as a fact that the plaintiff knew that if by reason of the defective gate his horse got out of his field it would necessarily get on to the railway owing to the railway gate also being defective. I think, therefore, that the negligence of the plaintiff did not in law amount to contributory negligence.

The next and more important question is whether the defendants owed a statutory duty to the plaintiff, as a member of the public or otherwise, to maintain an efficient gate at the level crossing. Mr. Shaw has shewn by his interesting and able argument that s. 68 of the Railways Clauses Consolidation Act, 1845, will not help the plaintiff, because s. 68 only deals with the duty of the railway company to provide accommodation works for the owners and occupiers of land adjoining the railway. Therefore, if a farmer owns a field which does not adjoin a railway, but which is next to the field of another farmer which does adjoin the railway, and the cattle of the former enter the field of the latter, without his licence, and thence go on to the railway through a defective fence and suffer injury, the owner of the cattle has no redress against the railway company, although the company have not performed the duty imposed on them by s. 68. Similarly if the land adjacent to the railway is a highway, and cattle, not being the property of the owner of the soil of the highway, while straying on the highway get through the fence on to the railway, the railway company is not liable to the owner of the cattle. Therefore no question arises in this case as to the rights of adjoining owners or occupiers under s. 68, and the cases decided under that section do not apply to this case. Nor does s. 47 have any application to this case, for that section deals with cases where a railway crosses a turnpike road or public

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carriage road on the level, and it is provided that the company shall maintain good and sufficient gates across the road, and employ proper persons to open and shut the gates, which are to be kept closed except when cattle or vehicles passing along the road are about to cross the railway. But it is important to observe that it has been decided that the duty of the company under s. 47 is a duty to every member of the public, and that even if a straying animal or a straying child of tender years gets on to the railway, owing to the gates not being kept closed, the company are liable if injury occurs.

I now come to s. 61, which is the section on which this case depends. That section deals with the case of a railway which crosses on the level highways which are either bridleways or footways, a class of way which is not so likely to be used by animals or young children as a public carriage road, and probably therefore a lesser obligation is imposed on the railway company. The duty of the company in the case of a footway is to maintain good and sufficient gates or stiles on each side of the railway where the footway communicates with it. That duty is not a duty imposed on the company in respect of a limited class of persons only, as is the duty under s. 68, but it is a duty owed to every member of the public, as in the case of s. 47, the only difference between s. 61 and s. 47 being that the duty under s. 61 is not so onerous as that under s. 47. The reason for the difference doubtless is that s. 47 deals with public carriage roads, and it is necessary that the gates should be kept closed, because carriages or animals coming along the road might otherwise not be able to pull up in time to prevent their getting on to the level crossing, and, moreover, as public carriage roads often pass through unfenced fields, there would be a danger of cattle straying on to the line if the railway gates were left open. But s. 61 only requires the railway company, in the case of a public footway, to provide a good and sufficient gate or stile, and, therefore, if a person using the footway leaves the gate open, and cattle are thus enabled to stray on to the line and get injured, the company would apparently not be liable. But if the company, instead of maintaining a good and sufficient gate across the footway, allows it to get into a defective condition, it is

guilty of a breach of its statutory duty under s. 61, and it seems to me to be in accordance with both good sense and the authorities to say that in that case it is liable if straying cattle get through the defective gate on to the line and are injured.

For these reasons I am of opinion that this appeal must be allowed.

BUCKNILL J. I am of the same opinion. When the construction of a railway is authorized by Act of Parliament, there are imposed on the railway company certain obligations necessary for the protection of the rights of the owners or occupiers of land adjoining the railway, and also for the protection of the public using highways which are crossed on the level by the railway. These obligations are statutory, and they vary in degree according to the circumstances. In the present case the railway crosses on the level a road which is an accommodation road and also a public footpath. The obligations of railway companies with regard to accommodation roads are regulated by s. 68 of the Railways Clauses Consolidation Act, 1845, under which section the railway company have to maintain certain works, as specified in the section, "for the accommodation of the owners and occupiers of lands adjoining the railway." The plaintiff does not come within that class, as he is not the owner of land adjoining the railway, and therefore the railway company are under no obligation towards him as regards the performance of their duties under s. 68; but this road is also a public footpath, and the obligations of the railway company in the case of footpaths are to be found in s. 61. The argument for the defendants must go the length of saying that the obligation imposed on a railway company by that section, "to make and at all times maintain" good and sufficient gates or stiles, is an obligation only towards persons who are lawfully using the footpath. I do not agree with that argument. In my opinion, if a horse, without any negligence on the part of its owner, strays on to a public footpath which a railway crosses on the level, and, owing to the defective condition of the railway company's gate, gets on to the railway and is injured, the railway company are liable for that injury

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which has been caused by their breach of the duty which the statute has by s. 61 placed upon them. In the present case the county court judge has found that this gate was insufficient. There was evidence on which he could so find, and therefore in my opinion the defendants are liable. I agree with what Phillimore J. has said as to there being no evidence on which the county court judge could find that the plaintiff was guilty of contributory negligence.

Appeal allowed.

Solicitors for plaintiff: *Francis White & Needham, for Forshaw & Parker, Preston.*

Solicitor for defendants: *R. H. Bentley, for C. C. & D. Forrester Addie, Fleetwood.*

F. O. R.

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Feb. 15.

GRAY *v.* OWEN.

Landlord and Tenant—Surrender by Operation of Law—Acceptance of Surrender under Mistake of Fact induced by Tenant—Liability of Tenant for Rent.

The plaintiff let a house to the defendant, a naval officer, for a term of years subject to a proviso that "should the tenant be ordered away from Portsmouth by the Admiralty he may determine this agreement by giving to the landlord one quarter's notice in writing." During the continuance of the tenancy the defendant received an order from the Admiralty to join a ship for foreign service, but shortly afterwards that order was cancelled. Subsequently to the cancellation the defendant, purporting to act under the terms of the agreement and in the belief that he was thereby entitled to do so, gave the plaintiff a quarter's notice of his intention to give up possession. The plaintiff, in the belief that the defendant was at that time under orders from the Admiralty to leave, resumed possession of the house on the expiry of the notice and advertised it for sale. Subsequently the plaintiff discovered the true facts, and brought the action to recover the rent which had accrued in the interval:—

Held, (1.) that the defendant was under the circumstances not entitled to give the notice to terminate the tenancy; (2.) that, as the non-disclosure of the cancellation of the Admiralty's order was not fraudulent, the fact that the plaintiff accepted the notice under a mistake induced by the act of the defendant did not prevent that acceptance from working

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a surrender by operation of law; but (3.) that the giving of the notice was a breach of an implied contract in respect of which the plaintiff was entitled to recover the amount of the rent due as damages.

APPEAL from the Portsmouth County Court.

By an agreement dated March 19, 1907, the plaintiff let to the defendant, an officer in the Royal Navy, a house at Havant for a term of three years and one half-quarter from May 9, 1907, at a yearly rent of 34*l*. The agreement provided that "should the tenant be ordered away from Portsmouth by the Admiralty he may determine this agreement by giving to the landlord one quarter's notice in writing to expire on any of the usual quarter days." The defendant entered under the agreement. On February 12, 1908, he received orders from the Admiralty to join H.M.S. *Ocean*, which was ordered to the Mediterranean. As his wife was ill and he was anxious not to be separated from her, he petitioned the Admiralty to withdraw his appointment. The Admiralty gave him the alternative of taking up his appointment or of being put on half pay. The defendant elected to go on half pay. On February 20 the Admiralty cancelled their order and on March 14 they put him on half pay. On March 25, 1908, the defendant gave notice in writing to the plaintiff of his intention to give up possession of the house on June 24. In giving that notice he purported to act under the terms of the agreement, and he did so under the belief that he was entitled to give it notwithstanding the cancellation of the Admiralty's order. The plaintiff, in the belief that the defendant was then under orders to leave Portsmouth, accepted the notice. The defendant gave up possession on June 24, and the plaintiff advertised the house for sale by auction with vacant possession. Subsequently the plaintiff, having discovered the true facts, brought this action in January, 1909, to recover two quarters' rent due at Christmas, 1908. The county court judge held that, the defendant having once been ordered away from Portsmouth, the condition entitling him to give notice to quit had arisen, and that the notice was valid notwithstanding the cancellation of the order, and that even if the notice was bad the plaintiff's acceptance of possession effected a surrender by operation of law. He accordingly gave judgment for the defendant. The plaintiff appealed.

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St. Gerrans, for the plaintiff. The notice to quit was bad. The meaning of the agreement was that the tenant might give notice to quit if he was under orders to leave at the time of the notice given. Here, as the order to leave was cancelled before the date of the notice, the defendant was in the same position as if no order had ever been given. Secondly, there was no surrender by operation of law. Such a surrender only takes effect by way of estoppel, where the landlord has done some act inconsistent with the continuance of the tenancy disentitling him to allege that it is still continuing. But there can be no estoppel where the act of the landlord is done in ignorance of the facts, and a fortiori is this the case where the mistake of the landlord is induced by the conduct of the tenant, as was the case here.

Rankin, for the defendant. The defendant was under the circumstances entitled to give the notice. The order to leave was, it is true, withdrawn on February 20, but that withdrawal did not put the defendant in the same position as if it had never been made, for he was thereby put on half pay, which rendered him less able to pay the rent of the house, and he was on half pay when he gave the notice. But if the defendant is wrong on that point, it is clear that the resumption of possession by the plaintiff with the intention of putting an end to the tenancy effected a surrender by operation of law.

[PHILLIMORE J. The defendant by giving the notice induced in the mind of the plaintiff a mistaken belief that the condition on which alone the notice might be given had arisen. Can he under those circumstances be heard to say that the plaintiff is estopped from disputing the determination of the tenancy? In *Bruce* v. *Ruler* (1), where a landlord at the request of his tenant, the defendant, accepted as tenant in his stead a third person who to the knowledge of the defendant had compounded with his creditors, and the defendant did not communicate that fact to the landlord, upon the new tenant proving to be insolvent it was held that the defendant was liable to the landlord for the rent. The suppression of a fact which, had it been known to the landlord, would have caused him to refuse the third person as his tenant was a fraud which vitiated the surrender.]

(1) (1828) 2 Man. & Ry. 3.

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But here there was no fraud, and in the absence of fraud the non-disclosure of a fact however material cannot prevent the surrender from taking effect upon the landlord's resuming possession.

[BUCKNILL J. We agree that the surrender of the tenancy was complete. But was not the defendant guilty of a breach of contract in giving the notice in circumstances in which he was not entitled to give it, and is he not liable in damages for that breach?]

There was no implied contract that the defendant would not give notice except in a certain event. It was for the landlord before accepting possession of the premises to satisfy himself that the occasion upon which the notice may be given has arisen.

BUCKNILL J. Though the facts of this case are somewhat novel, the rights of the parties may be determined by reference to ordinary principles. The plaintiff in March, 1907, let a house under a tenancy agreement to the defendant, who is an officer in the Navy, and by the terms of that agreement in the event of the defendant being ordered away by the Admiralty he was to be at liberty to terminate the tenancy by giving a quarter's notice to quit. On February 12 in the following year he was ordered away by the Admiralty, having been appointed to a ship which was ordered to the Mediterranean. In consequence of his wife's illness he begged the Admiralty to withdraw the appointment. He was given the option of joining the ship or being put on half pay. He chose the latter, and on February 20 his appointment was cancelled, and he was shortly afterwards put on half pay. At that time he had given no notice to give up possession, and it was not until March 25, when there was no existing order of the Admiralty ordering him away from Portsmouth, that he gave the plaintiff notice. The first question is whether under those circumstances he was entitled to give the notice. I think not, for it was not in accordance with the terms of the agreement, as he was not at that time under orders to leave. Therefore I am of opinion that the notice was bad, though in the absence of any finding of fraud we are bound to assume that it was given honestly and under a misunderstanding as to his rights under the agreement. It was

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indeed suggested that as the defendant was in a worse pecuniary position by being put on half pay, and it was a condition of the withdrawal of the Admiralty's order that he should be put on half pay, he could not fairly be treated as being in the same position as if the order had never been made. We cannot accept that contention. It does not get over the difficulty that at the time of the notice there was no existing order to leave. The notice then being bad, we have to decide whether the defendant in giving it was guilty of a breach of his agreement. We think he was. The liberty given by the agreement to the defendant to terminate the tenancy upon the occurrence of one specified event excludes his liberty to do so except in that event, and the agreement must be read as containing an implied undertaking by him not to give notice except in that event. On receiving the notice the plaintiff, in the belief that the notice was a valid one, accepted it, and, upon the defendant giving up possession at the quarter day, advertised the house for sale with vacant possession. We have already expressed the opinion that, as the defendant in giving the notice had no intention to deceive, the fact of the plaintiff having been misled by the defendant's act did not prevent his acceptance of the surrender from operating as a determination of the tenancy, and consequently the defendant is not liable for rent as though the tenancy were subsisting. But the acceptance of the surrender does not preclude the plaintiff from suing for damages for the breach by the defendant of the contract. It did not destroy the existing cause of action. If the plaintiff had succeeded in letting the house at the same or a higher rent, of course he would have only been entitled to nominal damages, but as he did not succeed in letting or selling it he is entitled to recover the amount of the rent which he has lost. The appeal must be allowed.

PHILLIMORE J. concurred.

Appeal allowed.

Solicitors for plaintiff: *Fielder, Le Riche & Co., for Biscoe-Smith & Blagg, Portsmouth.*

Solicitors for defendant: *Mills & Morley, for B. Kent, Portsmouth.*

J. F. C.

JARDINE, MATHESON & CO. *v.* CLYDE SHIPPING COMPANY.

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Feb. 14, 15, 16.

Charterparty—Construction—Contract to load "a cargo not less than 6500 tons but not exceeding 7000 tons."

A charterparty provided that the charterers should load "a cargo of beans not less than 6500 tons but not exceeding 7000 tons . . . . which the said charterers bind themselves to ship not exceeding what she can reasonably stow and carry over and above her cabin, bunkers, tackle, apparel, provisions, and furniture." It also contained the following clause: "Charterers to have the option of underletting the whole or part of the steamer":—

Held, that the charterers were bound to load a full and complete cargo within the limits specified.

Trial before Hamilton J. without a jury.

By a charterparty dated March 15, 1909, and made at Shanghai between the agents of the defendant company's steamer *Kish* and the plaintiffs as charterers it was provided "That the said steamer shall after completion of present voyage or voyages for owners' benefit proceed to load at Dalny . . . . and there . . . . load from the agents of said charterers . . . . a cargo of beans not less than 6500 tons but not exceeding 7000 tons net intake weight of beans in bags as usual which the said charterers bind themselves to ship not exceeding what she can reasonably stow and carry over and above her cabin, bunkers, tackle, apparel, provisions, and furniture." The charterparty also contained the following clause: "Charterers to have the option of underletting the whole or part of the steamer." The *Kish* commenced loading on May 25 and by June 5 had loaded 76,000 bags of beans equivalent to 6590 tons net weight of beans, and the charterers' agents claimed that in so doing they had discharged their obligation under the charterparty in respect of loading. The captain, however, insisted that they were bound to fill up the whole cargo space of the ship and that there remained unfilled a space sufficient for a further quantity of at least 360 tons, and he refused to sign bills of lading or to sail unless the charterers' agents shipped a further quantity of 360 tons or paid dead freight for that quantity. The charterers'

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agents thereupon shipped under protest a further quantity of 360 tons. On the arrival of the ship in the United Kingdom the defendants claimed 427*l.* 10*s.* freight in respect of the 360 tons and exercised their lien upon them. By agreement between the parties the said sum of 427*l.* 10*s.* was deposited at a bank in the joint names of their respective solicitors to abide the result of this action, whereby the plaintiffs claimed (inter alia) a declaration that they were entitled to have the deposit returned to them.

Scrutton, K.C., and *Robertson Dunlop*, for the plaintiffs. The contract of the charterers was to load a cargo, not a full and complete cargo. The parties have indicated what they meant by "a cargo" by the words "not less than 6500 tons but not exceeding 7000 tons." They intended that any quantity within those limits would satisfy the term "cargo," and that it should be at the charterers' option what quantity within those limits should be put on board. The words of the charterparty in *Miller* v. *Borner* (1) were very like those in the present case. There the charterer undertook to load "a cargo of ore say about 2800 tons." The actual capacity of the ship was 2880 tons, but it was held that the charterers satisfied their obligation by loading 2840 tons.

Bailhache, K.C., and *Stuart Bevan*, for the defendants. Prima facie and in the absence of special provisions in the charterparty indicating a different intention the expression "cargo" means a full and complete cargo, the entire load of the vessel: *Borrowman* v. *Drayton*. (2) In order to determine the meaning of the expression the rest of the charterparty must be looked at: *Caffin* v. *Aldridge*. (3) And here the obligation is to load a cargo "not exceeding what she can reasonably stow and carry" in the ordinary cargo spaces of the ship. That points to the conclusion that the plaintiffs were bound to load a complete cargo; as also does the provision that the charterers are "to have the option of underletting the whole or part of the steamer." The case of *Miller* v. *Borner* (1) is distinguishable. There the words "say about" preceding the words "2800 tons" shewed that the latter words

(1) [1900] 1 Q. B. 691. (2) (1876) 2 Ex. D. 15.
(3) [1895] 2 Q. B. 648.

were intended to be descriptive of what was meant by "a cargo." And the same thing was held in *Morris* v. *Levison* (1), where the words were "a full and complete cargo of iron ore say about 1100 tons." But here the words "not less than 6500 tons but not exceeding 7000 tons" are descriptive not of the cargo, but of the carrying capacity of the ship. They on the one hand amount to a warranty by the shipowners that the capacity shall be within those limits, and on the other impose an obligation on the charterers to load 7000 tons if the ship will hold so much. In *Carlton Steamship Co.* v. *Castle Mail Packets Co.* (2), where the contract was to load "a full and complete cargo of rails . . . . say about 2850 tons and not more than 3000 tons," it was held that the ship was entitled to receive a cargo of 3000 tons. The only difference between that case and the present is that there the contract was for a "full and complete" cargo. But the omission of those words in the present case is immaterial.

Scrutton, K.C., in reply.

HAMILTON J. In this case a question arises upon the construction of the charterparty. It provides that the steamer shall load "a cargo of beans not less than 6500 tons but not exceeding 7000 tons net intake weight of beans in bags as usual which the said charterers bind themselves to ship not exceeding what she can reasonably stow and carry over and above her cabin, bunkers, tackle, apparel, provisions, and furniture." Upon that clause the contentions raised are these. The charterers say that the charterparty in this case is in substance identical with the charterparty in the case of *Miller* v. *Borner* (3); that it means not a "full and complete" cargo of beans, but something less, the omission of those well-known words indicating an intention that the charterparty should be satisfied with a cargo which did not fill up the entire carrying space of the ship; and that, as nobody could contend that the 76,000 bags which they had loaded before the commencement of the dispute was not a "cargo," they had discharged their obligation. They further say that the words "not less than 6500 tons but not exceeding

(1) (1876) 1 C. P. D. 155. (2) (1897) 2 Com. Cas. 173.
(3) [1900] 1 Q. B. 691.

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7000 tons" gave them an option to ship any quantity they pleased within those limits, upon the ground that as they were the parties who had to perform the operation of shipping they ought to be the parties to determine within those limits how much should be shipped. On the other side it is said that the word "cargo" in a contract for the loading of a vessel prima facie means a complete cargo, so that when the ship has it on board she is a fully laden ship. It is said that one must always when construing a particular provision in a charterparty look at the other provisions for assistance in ascertaining its meaning, as was laid down in *Caffin* v. *Aldridge* (1), and that the provisions in this charterparty that the charterers should ship a cargo "not exceeding what she can reasonably stow and carry," and that they should "have the option of underletting the whole or part of the steamer," point to the conclusion that the cargo of beans contracted for was a cargo completely filling the ship. The shipowners point out that the words were not "a cargo of beans *of* 6500 tons," &c., so as to make those words and figures define the quantity of the cargo to be loaded, nor "a cargo of beans *say about* 6500 tons," but simply "a cargo of beans" accompanied by words describing the carrying capacity of the ship and warranting that that capacity was between the limits specified. I think that the construction put upon the charterparty by the shipowners is right; that a cargo of beans in this contract means in itself the entire lading of the vessel; that the words "not less than 6500 tons" are a warranty to the charterers that she can take so much cargo; and that the words "but not exceeding 7000 tons" are a term binding the shipowner not to ask for more than 7000 tons, but entitling him to receive that amount if she can take it. It appears to me that, unless the omission of the words "full and complete" distinguishes the case, which I think they do not, the decision of Mathew J. in *Carlton Steamship Co.* v. *Castle Mail Packets Co.* (2) concludes the matter.

[The judge found on the facts that the 6590 tons first loaded were sufficient to fill the legitimate carrying space of the ship,

(1) [1895] 2 Q. B. 648. (2) 2 Com. Cas. 173.

that the plaintiffs had consequently satisfied their obligation to load, and that the defendants were not entitled to freight on the extra 360 tons.]

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Judgment for the plaintiffs.

Solicitors for plaintiffs: *Parker, Garrett & Co.*

Solicitors for defendants: *Hollams, Sons, Coward & Hawksley.*

J. F. C.

MASON *v.* FULHAM CORPORATION.

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Feb. 3, 4.

London—Buildings—Rebuilding Party Wall—Sale of House by Building Owner—Subsequent Use of Party Wall by Adjoining Owner—Contribution to Expenses of Building—Who entitled to Contribution—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 99.

By the London Building Act, 1894, it is provided that where a building owner rebuilds a party wall, if at any time the adjoining owner makes use of the party wall for building purposes he shall bear a certain proportion of the expense of building the wall; and by s. 99 of that Act, "Where the adjoining owner is liable to contribute to the expenses of building any party structure, then until such contribution is paid the building owner at whose expense the same was built shall stand possessed of the sole property in the structure":—

Held, that the words "the building owner at whose expense the same was built" mean the building owner or his assigns as the case may be, and that where the building owner has after rebuilding the party wall sold his house, the purchaser or sub-purchaser who is in possession of the house at the time when the adjoining owner makes use of the party wall is the person who is entitled to receive the contribution.

APPEAL from the Brompton County Court.

In April, 1895, the plaintiff, who was then in possession of a house situate in the Fulham Road, adjoining the premises of the Fulham Free Library, gave notice under the London Building Act, 1894, to the Commissioners of the Fulham Free Library of his desire to rebuild a party wall between the stabling of his house and the library garden, and to carry the wall, which was then only of the height of ten feet, up to a height of forty feet. On May 21, 1895, an agreement was entered into between the plaintiff and the commissioners whereby it was provided that the

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plaintiff should be at liberty to pull down and rebuild the party wall, and that the commissioners should have the right at any time thereafter to use the party wall upon paying one moiety of the cost of its erection, such cost to be certified by the surveyor to the commissioners. The plaintiff rebuilt the wall and raised it to the height of forty feet. The cost of rebuilding it was certified by the said surveyor as being 111*l.* 9*s.* In December, 1896, the plaintiff conveyed his house to one Slater. The conveyance did not purport to assign to Slater the plaintiff's interest under the agreement of May 21, 1895, and the plaintiff stated that in fixing the price he took into consideration only half the cost of building the wall. On March 24, 1899, Slater conveyed the premises to Sir E. Galsworthy. Both these conveyances were expressed to convey the plot of ground with the shop and dwelling-house thereon delineated and described with the abuttals and dimensions shewn in the plans annexed thereto, and the dimensions in the plans shewed that the vendors only purported to convey up to half the thickness of the wall. The conveyance to the plaintiff had been expressed in similar terms. In September, 1899, the powers, duties, and liabilities of the library commissioners were transferred under the Local Government Act, 1894, to the vestry of Fulham, and by the London Government Act, 1899, the properties and liabilities of the vestry were transferred to the defendants. In 1908 the defendants, being then the owners of the Fulham Free Library, were desirous of enlarging their library by building on the site of the garden and for that purpose of using the party wall built by the plaintiff. They served a building notice on Sir E. Galsworthy under the London Building Act, 1894. A difference arose between him and the defendants, and surveyors were appointed in accordance with the provisions of that Act. The surveyors made an award that the defendants should pay 55*l.* 14*s.* 6*d.*, being a moiety of the cost of the party wall, to Sir E. Galsworthy. The defendants accordingly paid the said sum to Sir E. Galsworthy and proceeded to use the wall. The plaintiff then claimed from the defendants payment of the said sum of 55*l.* 14*s.* 6*d.* under the terms of the agreement of May 21, 1895, and brought this action to enforce that claim. The county

court judge held that the defendants had rightly paid the money to Sir E. Galsworthy as being "the building owner at whose expense the same was built" within the meaning of s. 99 of the London Building Act, 1894 (1), and dismissed the action. The plaintiff appealed.

Compton Smith, for the appellant. The plaintiff is the person who is entitled to receive the adjoining owner's contribution to the expense of building the party wall. It is true that the agreement of May, 1895, did not specify to whom the money was to be paid, but presumably it was to be paid to the person with whom the agreement was made, and that was the plaintiff and no one else. The meaning of s. 99 is that the money shall be paid to the person at whose expense the wall was built, and that is in this case the plaintiff. Sir E. Galsworthy cannot without great straining of language be said to answer the description of "the building owner at whose expense the same was built." It was not "at his expense" even in the sense that he paid Slater for it and Slater paid the plaintiff, for the evidence was that the plaintiff did not take it into consideration in fixing the price. The plaintiff never purported or intended to assign his rights under the agreement to Slater. He only conveyed half the thickness of the wall to Slater, as was indicated by the plan to which the conveyance referred. Slater took no interest in the half of the wall that was built on the commissioners' land. But for the operation of s. 99 of the London Building Act, 1894, that half would have belonged to the commissioners, but that section said that as the plaintiff had paid for building that half he should stand possessed of it until

(1) By s. 95, sub-s. 2, of the London Building Act, 1894, "If at any time the adjoining owner make use of any party structure . . . . raised . . . . as aforesaid . . . . beyond the use thereof made by him before the alteration there shall be borne by the adjoining owner from time to time a due proportion of the expenses (having regard to the use that the adjoining owner may make thereof); . . . .

"(i.) Of raising . . . . such party structure."

Sect. 99: "Where the adjoining owner is liable to contribute to the expenses of building any party structure, then until such contribution is paid the building owner at whose expense the same was built shall stand possessed of the sole property in the structure."

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the commissioners or their successors used it and paid him the cost of building it. Apart from the effect of s. 99 the two halves of the wall were held in severalty in the same manner as were the respective strips of land on which they were built. The case of *Matts* v. *Hawkins* (1) is a distinct authority that if two persons have a party wall, one half of the thickness of which stands on the land of each, that does not make them tenants in common of the wall. The case of *In re Stone and Hastie* (2) is in the plaintiff's favour. There the owners of a house in London raised a party wall and afterwards let the house to a tenant for twenty-one years. Subsequently the adjoining owner used the party wall to a greater extent than before the alteration. It was held by the Court of Appeal that the owners who raised the wall, and not their tenant, were the persons who were entitled to receive the adjoining owner's contribution to the expense. And the Court so held not because the parties who raised the wall were still the owners at the time when the contribution became payable, but because they raised it. Collins M.R. said, "I think it is obvious when this code is looked at that it provides for the recoupment of the owner at whose expense the wall was raised and not of any one else."

W. Mackenzie, for the defendants. The old party wall which the plaintiff pulled down was held by the owners of the land on either side as tenants in common: *Watson* v. *Gray*. (3) On the sale by the plaintiff to Slater the purchaser became entitled to the whole of the plaintiff's interest in the heightened wall as tenant in common with the library commissioners. The plaintiff's claim in this action passed to Slater under s. 63 of the Conveyancing Act, 1881. By s. 5, sub-s. 31, of the London Building Act, 1894, "The expression 'building owner' means such one of the owners of adjoining land as is desirous of building . . . . or is desirous of doing a work affecting" a "party wall or party structure"; and by sub-s. 32 "The expression 'adjoining owner' means the owner . . . . of land buildings storeys or rooms adjoining those of the building owner." Therefore upon the defendants proposing to build upon the party wall the

(1) (1813) 5 Taunt. 20. (2) [1903] 2 K. B. 463.
(3) (1880) 14 Ch. D. 192.

position of the parties was reversed, the defendants becoming in their turn the building owners. Then under s. 90 the defendants had to give a party structure notice to the person who then occupied the position of adjoining owner, that is Sir E. Galsworthy. Upon a difference arising between the defendants and Galsworthy surveyors had to be appointed under s. 91 to settle "any . . . . matter arising out of or incidental to such difference." That included the "due proportion of the expenses" of raising the party wall "having regard to the use that the adjoining owner may make thereof" under s. 95. It is obvious, therefore, that the proportion when ascertained was payable to the other party to the difference, namely, Sir E. Galsworthy, and not to the plaintiff. The proportion to be borne is to be ascertained when the use is made. If any part of the wall is made use of, then a proportionate part of the expense will be ascertained and paid; if at a later time a further use is made a further sum will be ascertained and paid. Here the parties for convenience' sake ascertained the amount payable in respect of an indefinite use by the agreement in 1895. The words of s. 99 "at whose expense the same was built" are not against the defendants' contention. There being two building owners, the original one who built the wall, and the defendants who became in turn building owners by using it, those words of s. 99 are used to distinguish between the two building owners and to indicate which of the two is to stand possessed of the sole property in the wall. They are not meant to distinguish between the person who actually built the wall and his successor in title. Further, the provisions of s. 99 are to apply where the adjoining owner "is liable," not where he "shall be liable." The section contemplates a present liability, not a future or potential one. Under sub-s. 1 of s. 95, "If any party structure be defective or out of repair the expense of making good underpinning or repairing the same shall be borne by the building owner and adjoining owner in due proportion." In such a case there is a present liability on the adjoining owner to bear part of the expense, and until such expense is paid by him the building owner is to stand possessed under s. 99 of the sole property in the structure. The structure is his security for payment. Under sub-s. 2 of s. 95, where the building owner

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rebuilds the party structure for his own purposes, as in this case, he is in the first instance to bear the sole expense, the expense of so rebuilding being one of the "expenses to be borne by the building owner." Sect. 99 has not in that case any immediate operation. But when the adjoining owner makes use of the party wall under the concluding part of s. 95, then until he is paid his due proportion of the expenses the building owner is to stand possessed of the sole property in the structure. The words "stand possessed" are meaningless unless they are applied to a present owner. For otherwise the provision would dispossess not only the new building owner who has made default, but also the innocent purchaser from the original building owner who has made no default at all. It follows that the plaintiff is not entitled to succeed.

Compton Smith in reply. The case of *Watson* v. *Gray* (1) decides nothing more than that where an owner of two adjoining houses conveys them to different purchasers and declares in the conveyances that the wall dividing them shall be a party wall his presumed intention is to confer a tenancy in common of the wall and of the soil on which it stands. It turned on a mere question of construction of the deed, the ground of the decision being that the term "party wall" has acquired the prima facie meaning of a wall held in common; and it has acquired that meaning because the circumstances under which the party wall was built are frequently not known, and in such a case the law presumes a tenancy in common of both the wall and the soil it is built on: *Cubitt* v. *Porter*. (2) But where, as here, the two strips of land on which the wall is built are held in severalty the two halves of the wall follow the same rule, Cujus est solum ejus est usque ad cœlum.

PHILLIMORE J. I am of opinion that the decision of the county court judge in this case should be affirmed. The plaintiff was in the year 1895 possessed of a building in the Fulham Road adjoining the premises of the Commissioners of the Fulham Free Library (who are now represented by the defendants) and separated from those premises by a party wall. He proposed to

(1) 14 Ch. D. 192. (2) (1828) 8 B. & C. 257.

pull down and rebuild that wall, raising it to a greater height than it had before, and he served notice of that proposal under the London Building Act, 1894, upon the commissioners as the adjoining owners. On May 21, 1895, he entered into an agreement in writing with the commissioners whereby they assented to his pulling down and rebuilding the party wall on the terms that they should have the right to use the wall at any time thereafter upon their paying a moiety of the cost of building it, the cost to be certified to them by their surveyor. The object of that agreement was to fix beforehand, and thereby to avoid the necessity of arbitration for the purpose of determining, the "due proportion of the expenses" which under s. 95 they would have to bear in the event of their using the wall. That due proportion was fixed at one half. The plaintiff accordingly rebuilt the wall, and the commissioners' surveyor certified the half of the expenses at 55*l.* 14*s.* 6*d.* In 1896 the plaintiff conveyed his premises with the shop and dwelling-house which he had erected on them to one Slater, and in March, 1899, Slater conveyed the premises to Sir E. Galsworthy. What then was the nature of the property in the wall at the time of those conveyances? It was a party wall, built partly on the plaintiff's land and partly on that of the commissioners, and the plaintiff and the commissioners were in the position of tenants in common of that wall according to the view expressed by Fry J. in *Watson* v. *Gray* (1) and by the Court of King's Bench in *Cubitt* v. *Porter*. (2) The plaintiff then having an interest in the wall as tenant in common conveyed that interest to Slater. He cannot be heard to say that he conveyed a shop with three walls; he conveyed all that he had to convey. It was suggested that as he conveyed by metes and bounds, and that as those metes and bounds did not extend beyond half the thickness of the wall, only one half the wall passed by the conveyance. But that is a mistake, for the metes and bounds referred only to the soil underlying the wall, not to the wall itself. The plaintiff was not sole owner of half the wall, but tenant in common of the whole, and it was that tenancy in common of the whole that passed by the conveyance to Slater, and from Slater to Galsworthy. While Galsworthy was owner

(1) 14 Ch. D. 192. (2) 8 B. & C. 257.

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Phillimore J.

of the premises which had formerly belonged to the plaintiff, the borough council of Fulham, in whom the estate of the library commissioners had become vested, were minded to build upon the party wall, and thereupon the provisions of the second part of s. 95 came into play. That section provides that "If at any time the adjoining owner make use of any party structure . . . . raised . . . . as aforesaid . . . . beyond the use thereof made by him before the alteration there shall be borne by the adjoining owner from time to time a due proportion of the expenses (having regard to the use that the adjoining owner may make thereof) (i.) of raising . . . . such party structure." As I have already said, that due proportion had been fixed by agreement at one half. The question is, Who was the proper person to receive it? The plaintiff contends that he is the proper person upon the ground that he is the person who is indicated by s. 99 as entitled to the money. That section says that "Where the adjoining owner is liable to contribute to the expenses of building any party structure, then until such contribution is paid the building owner at whose expense the same was built shall stand possessed of the sole property in the structure." He says that he is the only person answering the description of "the building owner at whose expense the same was built." The difficulty in the way of that contention is that the plaintiff is no longer the owner at all. The section contemplates a person who is the building owner at the time when the money has to be paid. It gives a security for the money to the person entitled. But it gives that security only upon the occasion of the adjoining owner becoming liable, the words being, as Mr. Mackenzie has pointed out, "where the adjoining owner *is* liable," whereas the contention of the plaintiff involves the proposition that the owner who rebuilt the party wall is to stand possessed of it from the date of the rebuilding as security for the discharge of a contingent liability that may never arise. Until the adjoining owner wants to use the party wall there is no reason why the building owner should have any security. But where the adjoining owner does use the wall he becomes liable to pay his proportion of the cost, and from that time the building owner is entitled to hold the whole wall as security for the payment, if he is still the owner.

I say if he is still the owner, because when once it is conceded that the right of the building owner to stand possessed of the whole wall does not arise until the adjoining owner wants to build it is obvious that it is not a right which can be exercised by a person who having once been the owner has parted with his property. The words "shall stand possessed of the sole property" point to the person being already part owner. If he is not already part owner the section does not apply. The words "the building owner at whose expense the same was built" must be taken to mean the person who at the material time happens to be the owner of the plot whether there has in the interval been a change of ownership or not. It is only reasonable to assume that the rights of the building owner to contribution pass with the assignment of the property. There is no hardship in that view. The plaintiff, if he thought that the contingent right of contribution had any substantial value, might have made a provision in the conveyance reserving that right to himself. The appeal must be dismissed.

BUCKNILL J. I am of the same opinion. It seems to me that common sense is in favour of the defendants. The plaintiff and the library commissioners were originally tenants in common of a party wall which was only ten feet high. The plaintiff being minded to raise it to forty feet, an agreement was entered into between him and the commissioners whereby it was agreed that he might raise it to the height proposed, and that in the event of their subsequently using the wall they should pay half the cost. The plaintiff then conveyed to Slater all his interest in the premises. Then Slater conveyed all that he had to Galsworthy. Up to that time the commissioners and their successors, the defendants, had done nothing to the wall; they had not made any use of it beyond the use made by them before the alteration. But when the defendants did use it to a greater extent than before there arose under s. 95 a liability to pay a due proportion (which had already been fixed at one half) of the expense of raising the wall to forty feet. But the section does not say to whom the defendants became liable. That is indicated by s. 99. [He read the section.] In my opinion that section means this: that whereas

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but for that section Galsworthy and the defendants would be tenants in common and nothing more, with no liability on the defendants to make any contribution to the expense of raising the wall, upon their making use of the wall, and not until then, there arose an immediate liability to pay the contribution to the person who was then in the position of the building owner, and that person in this case happened to be, not the original building owner who raised the wall, but his successor in title. The decision of the county court judge must be affirmed.

Appeal dismissed.

Solicitors for plaintiff: *Rawlings & Butt.*
Solicitor for defendants: *R. M. H. Humphrey.*

J. F. C.

1910
Jan. 29.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* THOMPSON.

Criminal Law—Evidence—Statement by Prisoner read over to Co-prisoner—Denial of Truth of Statement—Admissibility against Co-prisoner.

The appellant and another person were arrested on a charge of burglary. The appellant's fellow prisoner thereupon made a voluntary statement to a police officer, confessing his guilt and implicating the appellant in that and other burglaries, and the statement was taken down in writing and signed by him. Subsequently the two prisoners were placed together at the police station, and after being duly cautioned they were charged with the burglary. A police officer then read over the above-mentioned statement to both prisoners, and the appellant denied the truth of the whole of it. At the trial the appellant's fellow prisoner pleaded guilty to the indictment, and the trial proceeded against the appellant. The prosecution tendered in evidence the statement which had been read over in the appellant's presence, when it was objected, upon the authority of *Reg.* v. *Smith*, (1897) 18 Cox, C. C. 470, that such a statement could only be admissible as evidence against the appellant if there had been an admission by him of the truth of the whole or some part of it, and that, as he had denied its truth, it was not admissible. The statement was admitted, and the appellant was found guilty:—

Held that, notwithstanding the appellant's denial of the truth of the allegations contained therein, the statement was admissible against him.

Reg. v. *Smith*, 18 Cox, C. C. 470, not followed.

APPEAL against a conviction.

The appellant and one Archer were indicted at the Derbyshire

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quarter sessions for burglary. Archer pleaded guilty and the appellant not guilty.

It appeared from the evidence that after the appellant and Archer had been arrested on the charge of burglary the latter made a voluntary statement, not in the appellant's presence, to a police officer, who took it down in writing, and Archer then signed it. The appellant and Archer were then placed together at the police station in the presence of two police officers, and after being duly cautioned they were charged with the burglary. Archer replied, "I have made my statement and signed it." The appellant replied, "I know nothing about it." One of the police officers thereupon produced the statement, and Archer said, "Yes, that is my statement." The statement was then read over to the two prisoners. The statement began by saying that "when Dick"—the appellant—"came from Dartmoor" he called at Archer's house, and it went on to implicate both Archer and the appellant in various burglaries, giving details of them, including the one the subject-matter of the indictment. As soon as the statement was read over the appellant said, "It is a pack of lies, I don't know the man at all." Archer thereupon said, "You know it is the truth. Why don't you own up like a man?" When the police officers were called as witnesses at an early stage of the trial, counsel for the prosecution tendered the above statement in evidence, and it was objected to by counsel for the appellant as not being admissible against him, the appellant having denied the truth of the whole of it. The chairman admitted it, and it was read to the jury together with the answers given above. Upon the statement being read the chairman said to the jury: "It is my duty to tell you that you should not accept anything that is stated in that as true in any way. It may be absolutely false, and you must not accept it even provisionally as true. I must ask you at this stage not to let the statement prejudice you against the prisoner Thompson." Archer was subsequently called as a witness for the prosecution, and his was the main evidence against the appellant. The chairman, in summing up to the jury, after directing them that it was necessary, before they could properly act upon the evidence of an accomplice, that

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such evidence should be corroborated, and that in this case there was some corroboration, said with reference to Archer's statement: "When Thompson was taken into custody the statement was read over to him. I would not ask you to place too much reliance upon that statement, for this reason, that when the statement was read Thompson immediately said it was a pack of lies. I do not think you can accurately draw from that any inference as to the truth of the statements contained in that disclosed to Thompson. He denied the whole matter, and it rests there." The jury found the appellant guilty and he was sentenced to seven years' penal servitude.

H. T. Wright, for the appellant. The statement made by the appellant's fellow prisoner Archer to the police officer is not admissible as evidence against the appellant. The statement would have been admissible only if the appellant, having heard it read over to him and having had an opportunity of answering it, either from his language, silence, or conduct substantially admitted the truth of the whole or some portion of it: per Hawkins J. in *Reg.* v. *Smith.* (1) Such a statement is only admissible if it contains some fact or facts which the prisoner against whom it is tendered in evidence has admitted to be true. In *Rex* v. *Bromhead* (2) the prisoner made no remark when the statement of his fellow prisoner implicating him was read over to him, and therefore it may be said that there was some evidence that by his silence he admitted its truth. The statement in that case was admissible as coming within the principle laid down by Hawkins J. in *Reg.* v. *Smith.* (1) In the present case the appellant denied the truth of the whole of the statement, and therefore it is not admissible against him as containing, when taken with his answer thereto, an admission by him. The statement moreover contained a reference to the appellant having been at Dartmoor, the obvious inference being that he had been previously convicted. The admission of such a statement before the jury was fatal to the appellant, and therefore it cannot be said that its admission caused no substantial miscarriage of justice within s. 4, sub-s. 1, of the Criminal Appeal

(1) 18 Cox, C. C. 470. (2) (1906) 71 J. P. 103.

Act, 1907 (7 Edw. 7, c. 23). Accordingly, notwithstanding that there was some corroboration in a material particular of the evidence given by Archer at the trial, the conviction cannot stand. [Archbold's Criminal Pleading, 23rd ed., p. 323, was also referred to. (1)]

Moresby White, for the prosecution, was not called upon.

The judgment of the COURT (Lord Alverstone C.J., Ridley and Darling JJ.) was delivered by

LORD ALVERSTONE C.J. The ground of appeal in this case is that a statement made by the appellant's fellow prisoner Archer to a police officer after his arrest, which was subsequently read over in the presence of both prisoners, was admitted in evidence against the appellant and read to the jury, although the appellant denied the truth of the allegations therein contained. At the trial Archer pleaded guilty. I desire to express no opinion with regard to the stage of the proceedings at which the statement, if admissible, should have been put in. That must depend upon the facts of each case and upon the way in which the case is being conducted. I can conceive many cases in which such a statement ought not to be tendered in evidence until after all the other evidence for the prosecution has been given. The admissibility of the statement is quite apart from the question as to the stage of the proceedings at which it should be given in evidence.

With regard to the question of the admissibility of the statement, if the decision of Hawkins J. in *Reg.* v. *Smith* (2) is supposed to have laid down as a matter of law that such a statement as was made by the appellant's fellow prisoner in the present case, incriminating the appellant, is not admissible as against the latter unless it is either wholly or in part admitted by him, in my opinion it goes too far. It may well be that the judge who presides at the trial may not know, when the statement is tendered in evidence, what answer the prisoner who is being tried gave when the statement was read over to him. I

(1) See also *Reg.* v. *Mitchell*, (1892) 17 Cox, C. C. 503, at p. 508; Taylor on Evidence, 10th ed., s. 907.

(2) 18 Cox, C. C. 470.

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adhere to what I said in *Rex* v. *Bromhead* (1): "I am not going to lay down any general rule as regards the admissibility of statements made by one person and read over to the prisoner. I am certainly not going to say that if the prisoner says, 'It's a lie,' the statement is not admissible, and that, if he does not say that, it is admissible." In the present case, after the statement had been read to the jury, the learned chairman told them not to accept anything in that statement as true in any way, even as provisionally true, and not to let the statement prejudice them against the appellant. Nothing could have been fairer, and again in his summing up he repeated that warning to the jury. Archer was called as a witness for the prosecution, and he implicated the appellant in the offence charged. The learned chairman properly directed the jury that it was necessary, before they could convict the appellant upon the evidence of an accomplice, namely, Archer, that that evidence should be corroborated in a material particular, and he pointed out to them that there was some corroboration of Archer's evidence. In our opinion the statement of Archer which was read over in the presence of the appellant was properly admissible in evidence against him, though the weight which should be attached to it was entirely a matter for the jury to determine upon a proper direction after hearing all the evidence, and the most that can be said is that the statement was given in evidence at an earlier stage of the trial than it might have been if the case had been conducted differently. We cannot follow the ruling of Hawkins J. in *Reg.* v. *Smith* (2) that such a statement is not admissible unless it is either in whole or in part admitted by the appellant to be true. A decision to that effect would in strictness exclude the case of a prisoner remaining silent and giving no indication as to whether he admitted or denied the truth of any part of the statement. The point therefore taken on behalf of the appellant fails, and the appeal must be dismissed.

Appeal dismissed.

Solicitor for prosecution: *Director of Public Prosecutions.*

Solicitor for appellant: *Registrar of the Court of Criminal Appeal.*

W. F. B.

(1) 71 J. P. 103.

(2) 18 Cox, C. C. 470

[IN THE COURT OF APPEAL.]

C. A.
1910
Feb. 24, 25.

GUNDRY *v.* SAINSBURY.

Costs—Solicitor and Client—Agreement as to Solicitor's Remuneration—Verbal Agreement that Client should pay no Costs—Right to recover against a Third Party—Attorneys and Solicitors Act, 1870 (33 & 34 *Vict. c.* 28), *ss.* 4, 5.

A solicitor, who was acting for a client in a county court action in which the client was plaintiff, verbally agreed with him that he, the client, should not pay the solicitor any costs. At the trial of the action the jury returned a verdict for the plaintiff with damages. The county court judge, on the application of the defendant, entered judgment for the plaintiff for the amount of the verdict without costs on the ground that under the proviso to s. 5 of the Attorneys and Solicitors Act, 1870, the plaintiff was not entitled to recover from the defendant more costs than were payable by the plaintiff to his solicitor under the agreement:—

Held, first, apart from the Act of 1870, that the plaintiff could not recover from the defendant more costs than he was liable to pay his solicitor, inasmuch as party and party costs were awarded as an indemnity only; secondly, upon the construction of the Act, that for the purpose of applying the proviso to s. 5 it was not necessary that the agreement should be in writing; consequently that the county court judge had rightly entered judgment for the plaintiff without costs.

Decision of the Divisional Court, [1910] 1 K. B. 99, affirmed.

Appeal from the decision of a Divisional Court (Darling and Bucknill JJ.). (1)

The action was brought in the Wandsworth County Court to recover damages for injuries alleged to have been sustained by the plaintiff through having been bitten by the defendant's dog. The plaintiff, who was a labourer, gave evidence at the trial, and in the course of cross-examination he stated, in answer to a question by the defendant's counsel, that he could not pay costs, and that he had arranged with his solicitor not to pay the costs of the action. The jury found for the plaintiff with damages 15*l.* Counsel for the defendant thereupon asked the county court judge to enter judgment for the plaintiff for 15*l.* without costs

(1) [1910] 1 K. B. 99.

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on the ground that, there being according to the plaintiff's evidence an agreement between the plaintiff and his solicitor that the plaintiff should pay the solicitor no costs, the plaintiff was under the proviso to s. 5 of the Attorneys and Solicitors Act, 1870 (1), not entitled to recover from the defendant more costs than were payable by the plaintiff to his solicitor under the agreement, and that was nothing. The county court judge adjourned the further argument of this question to a later day, when it was contended for the plaintiff that, as the agreement was verbal, the proviso to s. 5 had no application. The county court judge reserved his decision, and on the day appointed by him for the delivery of his judgment an application was made to him by counsel for the plaintiff that the solicitor of the plaintiff be allowed to give evidence as to the terms on which he had agreed to act for the plaintiff. The county court judge declined to allow the solicitor to give evidence. He found as a fact that there was a verbal agreement between the plaintiff and his solicitor that the plaintiff should not pay the solicitor any costs, and he gave judgment for the plaintiff for 15*l.* without costs, holding, on the authority of *Clare* v. *Joseph* (2), that for the

(1) Attorneys and Solicitors Act, 1870 (33 & 34 Vict. c. 28), s. 4 :— "An attorney or solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges, or disbursements in respect of business done or to be done by such attorney or solicitor, whether as an attorney or solicitor or as an advocate or conveyancer, either by a gross sum or by commission or percentage, or by salary or otherwise, and either at the same or at a greater or at a less rate as or than the rate at which he would otherwise be entitled to be remunerated, subject to the provisions and conditions in this part of this Act contained : . . . ."

Sect. 5 : "Such an agreement shall not affect the amount of, or any rights or remedies for the recovery of, any costs recoverable from the client by any other person, or payable to the client by any other person, and any such other person may require any costs payable or recoverable by him to or from the client to be taxed according to the rules for the time being in force for the taxation of such costs, unless such person has otherwise agreed : Provided always, that the client who has entered into such agreement shall not be entitled to recover from any other person under any order for the payment of any costs which are the subject of such agreement more than the amount payable by the client to his own attorney or solicitor under the same."

(2) [1907] 2 K. B. 369.

purpose of applying the proviso to s. 5 of the Act the agreement need not be in writing.

The plaintiff appealed to the Divisional Court. The Court dismissed the appeal substantially on the grounds given by the county court judge.

The plaintiff appealed to the Court of Appeal.

Moyses and *A. H. Forbes* (in the absence of *Eric Dunbar*), for the appellant. The judgment of the Divisional Court proceeded upon a misapprehension of the effect of *Clare* v. *Joseph*. (1) All that the Court of Appeal there decided was that s. 4 of the Attorneys and Solicitors Act, 1870, did not affect the position of a client who sets up an agreement as to costs with a solicitor. The only effect of s. 4 is to empower a solicitor to make an agreement in writing with his client; it has no application at all to an agreement which is being set up by the client, and the view of the Court in *Clare* v. *Joseph* (1) was that if a solicitor was going to set up an agreement with his client as to costs he must produce an agreement in writing, but that if the client was setting up the agreement it need not be in writing because s. 4 was unnecessary and irrelevant. Sect. 4 was passed to relieve the disability of the solicitor and was not required for any other purpose, and the ratio decidendi was that where a client was setting up a verbal agreement it was not within s. 4 at all. But if the agreement was not an agreement within s. 4 it was not within s. 5.

[BUCKLEY L.J. It is an agreement within s. 4, but if the client sets it up the statutory enactment is not required to support it.]

The only agreement which is within s. 4 is an agreement in writing, and consequently the words "such an agreement" at the commencement of s. 5 imply that the agreement must be in writing; therefore the proviso to s. 5 has no application to the verbal agreement in this case.

Shearman, K.C., and *Ricardo*, for the respondent. At common law costs as between party and party are awarded as an indemnity only, and if the plaintiff has incurred no costs he can recover nothing from the defendant: *Harold* v. *Smith* (2); *Henderson* v.

(1) [1907] 2 K. B. 369. (2) (1860) 5 H. & N. 381, 385.

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Merthyr Tydvil Urban Council (1); and the proviso in s. 5 of the Act of 1870 simply reaffirms the common law doctrine. Upon this view of the case it is not necessary for the defendant to rely upon the Act at all. But further this case is covered in principle by *Clare* v. *Joseph* (2) and *Jennings* v. *Johnson*. (3) "Such an agreement" in s. 5 does not necessarily mean an agreement in writing; it means an agreement between the solicitor and the client that the solicitor shall receive greater or less remuneration than the normal rate.

Moyses in reply.

COZENS-HARDY M.R. This appeal raises a curious and in one way an important point. The plaintiff, a labourer, commenced an action in the county court claiming damages for injuries sustained by the bite of a dog. The action was fought, the plaintiff recovered damages 15*l*., and the learned county court judge ordered judgment to be signed for that amount and has not given as against the defendant any costs of the action. There are two passages in his judgment which state quite clearly his reasons for adopting that course. He said first that "The question in this case was whether the successful plaintiff was entitled to the costs of the action, he having stated in his cross-examination that he had verbally agreed with his solicitor that he (the plaintiff) should not pay him any costs," and a little further on, "In this case the agreement between client and solicitor was that the client should pay the solicitor nothing in respect of costs." I do not know how you can have better evidence of that matter as against the plaintiff than his own statement, and the learned judge, having had that statement made in the witness-box by the plaintiff on cross-examination, and having reserved the consideration of the question of costs to a subsequent day, no application was made to him at that time to admit further evidence; but at the last moment he was asked to allow further evidence to be given. The learned judge in the exercise of his discretion refused to do so. I think it is impossible for us to interfere with that exercise of his discretion, and

(1) [1900] 1 Q. B. 434, 437. (2) [1907] 2 K. B. 369.
(3) (1873) L. R. 8 C. P. 425.

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I have not the smallest doubt that upon the evidence before him he was amply justified in arriving at the conclusion he did, that there was an agreement between the client and the solicitor that nothing should be paid to the solicitor for costs. That gives rise to the question what is the position of the defendant in the action in consequence of that state of things? I think that the common law point made by counsel for the respondent, which has not been dealt with by counsel for the appellant in his reply, is a good point and is sufficient to dispose of this case. What are party and party costs? They are not a complete indemnity, but they are only given in the character of an indemnity. I cannot do better than read the opinion expressed by Bramwell B. in *Harold* v. *Smith* (1): "Costs as between party and party are given by the law as an indemnity to the person entitled to them; they are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them. Therefore, if the extent of the damnification can be found out, the extent to which costs ought to be allowed is also ascertained." Now in the face of the evidence which the learned county court judge has accepted, and which he was perfectly justified in accepting, if he had ordered the defendant to pay these costs he would have been giving a bonus to the party receiving them. That is contrary to justice and to common sense and also to the law as laid down in *Harold* v. *Smith*. (2) That is a decision which has remained undisturbed for fifty years, and I am not prepared to depart from it. On that ground alone I think that this appeal must fail. But a further and difficult point arises under ss. 4 and 5 of the Attorneys and Solicitors Act, 1870. The agreement, I assume, was a verbal agreement, though there is no evidence upon the point, and it is said that the agreement referred to in those two sections is limited to an agreement in writing. The object of that group of clauses beginning at s. 4 and going on to s. 15 was undoubtedly to favour solicitors by enabling them to make certain bargains with their clients in respect of costs which they could not otherwise have made. [The Master of the Rolls read ss. 4 and 5.] It is to my mind apparent that the proviso at the end of s. 5, though

(1) 5 H. & N. 381, at p. 385. (2) 5 H. & N. 381.

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not purely declaratory, was the application of the settled common law principle to the particular facts of the case there dealt with and was absolutely necessary having regard to the first part of s. 5.

In the view of the Court below that proviso applies not merely to an agreement in writing, but to any agreement for the solicitor's remuneration which, as was held in *Clare* v. *Joseph* (1), the client can take the benefit of, although not in writing. I am not prepared to say that that view of the section is wrong. I feel perhaps more difficulty upon the construction of the statute than my brethren appear to do, but on the common law point I feel no doubt at all that the respondent to this appeal was right. I am not prepared to say he was not right also on the Act of 1870. But on one or other of these grounds I think that this appeal should be dismissed, and dismissed with costs.

FLETCHER MOULTON L.J. I am of the same opinion. The Master of the Rolls has dealt with the common law point which in my opinion is quite sufficient to decide this appeal, because I think the passage which the Master of the Rolls quoted from the judgment of Bramwell B. is sound law and is decisive of this case. But I am also of opinion that the case may be decided in the same way under the provisions of the Attorneys and Solicitors Act, 1870. The position of agreements between solicitor and client as to the amount of the solicitor's professional remuneration has been dealt with at length by the Court of Appeal in *Clare* v. *Joseph* (1), but it is not necessary to refer to that case further than to say that I venture to think it clearly laid down the proposition that prior to the Act of 1870 solicitors and clients could enter into such agreements, but that the solicitor could not set them up if they were not favourable to the client. The consequence is that they were of imperfect validity in the hands of the solicitor. The Act of 1870 purports to alter this. Part I. relates to agreements between attorneys and solicitors and their clients with respect to the amount and manner of the solicitor's remuneration and says that an attorney or solicitor may validly make such agreements in writing. It therefore prescribes the

(1) [1907] 2 K. B. 369.

formality which must be gone through in order to make such an agreement enforceable in the hands of the solicitor, which it was not in all cases prior to the Act. In other words, I look upon s. 4 as dealing with a well-known type of agreement and laying down the formality which is necessary to enable the solicitor to set up such an agreement against his client. Sect. 5 provides, broadly speaking, that agreements of this kind shall not affect the rights of third parties. It may be a question whether it was necessary that this should be expressed in the Act of Parliament, because the general principles of law would probably have prevented its affecting the rights of third parties not parties to the agreement. But s. 5 goes on to say that any person who is bound to pay costs to which such an agreement relates may require the costs payable by him to the client to be taxed according to the rules for the time being in force. That is an enactment which may or may not have been necessary. It may be that under the ordinary law he would have had such a right. But inasmuch as the section expressly provides that he can require the costs payable by him to the client to be taxed according to the ordinary rules of taxation there arises this question: Supposing the costs payable by the client to his solicitor under the agreement are less than those which the taxation shews to be the normal costs, what then? The latter part of the section provides for such a case. The principle that party and party costs are only an indemnity—an imperfect indemnity, it is true, but never more than an indemnity—is so deeply rooted in our law that the proviso is put in for the purpose of preventing the earlier part of s. 5 from ever giving rise to a case in which costs could be made a profit. By this proviso it is enacted that the client who has entered into such an agreement shall not recover from the person liable to pay to him the costs a greater sum than he himself is under the agreement liable to pay to the solicitor. This proviso is only declaratory in a special instance of what is the general law as to awarding costs throughout our legal system. Both parts of s. 5, in my opinion, relate to all agreements of the class to which s. 4 applies, that is to say, agreements between a solicitor and his client respecting the amount to be paid to the solicitor for his

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professional services, and they apply equally whether the agreement be in writing or not. For these reasons I think that both under the statute and at common law this appeal should be dismissed.

BUCKLEY L.J. We have enjoyed the benefit of a clear and closely reasoned argument by Mr. Forbes and I thank him for it. The argument is none the less valuable because it does not succeed. If his contention were right it would result that if there were an agreement between the plaintiff and his solicitor that the solicitor should charge only half costs, then if the agreement were in writing the defendant would by reason of the proviso be entitled to have the benefit of it; but if it were a verbal agreement the defendant would not get the benefit of it, but would have to pay full costs, and that would ensue from a statute whose purpose was, as was said in *Clare* v. *Joseph* (1), to relieve the solicitor from the disability under which he otherwise would lie. It is of course exceedingly improbable that the statute intended any such result. Let us look at the two sections. Sect. 4 relates to any agreement between a solicitor and his client respecting the amount of the solicitor's remuneration. The language of the section is "respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges, or disbursements in respect of business done or to be done by such attorney or solicitor, whether as an attorney or solicitor or as an advocate or conveyancer, either by a gross sum, or by commission or percentage, or by salary or otherwise, and either at the same or at a greater or at a less rate as or than the rate at which he would otherwise be entitled to be remunerated." That is a sufficiently long sentence to justify the use of the words "such an agreement" in s. 5, those being the words with which that section commences. The words "such an agreement" mean, I think, an agreement such as is described by all those words in s. 4. Now, as this Court held in *Clare* v. *Joseph* (1), if the solicitor is coming to set up an agreement of that kind he cannot be listened to unless he produces an agreement in writing.

(1) [1907] 2 K. B. 369.

But if the client sets up such an agreement it is no objection that the agreement was verbal and not in writing. Here we have to consider a case in which not the client but the defendant whom the client was suing seeks to set up an agreement under which the solicitor was to take less than the full amount of his costs. It is a case, therefore, which falls within the principle of *Clare* v. *Joseph* (1), that it is only where the agreement is being set up by the solicitor that the statute requires that it shall be in writing. So much for the construction of the statute. Secondly, I agree with the ground on which the Master of the Rolls has primarily rested his judgment. Suppose the Act of 1870 does not apply. Then the client comes to the Court and says "This is a matter in respect of which I am entitled to get costs because I have been put to expense, and the law as administered in this Court allows me in that state of things to be indemnified by the defendant to the extent of party and party costs." But he having come to assert that right, the Court says "True, you are entitled to such indemnity, but inasmuch as you have nothing to pay by reason of your agreement with your solicitor there is nothing for which to indemnify you." I confess I feel some regret that the solicitor was not allowed to go into the box and state the real facts relating to the agreement, but that was a matter to be determined by the county court judge. He dealt with it in the exercise of his discretion, and he found as a fact—and his finding is of course binding upon us—that there was such an agreement as was sworn to by the plaintiff in his cross-examination. On both these grounds I think that this appeal fails and should be dismissed with costs.

Appeal dismissed.

Solicitor for appellant: *C. F. Appleton.*
Solicitor for respondent: *L. Tubbs.*

(1) [1907] 2 K. B. 369.

H. B. H.

1910

Feb. 5.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* IRELAND.

Criminal Law—Conviction—Person insane at Time he did Act charged—Special Verdict—Right of Appeal—Trial of Lunatics Act, 1883 (46 & 47 *Vict. c.* 38), *s.* 2, *sub-ss.* 1, 2—*Criminal Appeal Act*, 1907 (7 *Edw.* 7, *c.* 23), *s.* 3.

When a special verdict is returned under s. 2, sub-s. 1, of the Trial of Lunatics Act, 1883, to the effect that the accused person was guilty of the act or omission charged against him in the indictment as an offence, but was insane at the time when he did the act or made the omission, and an order for his detention is thereupon made under s. 2, sub-s. 2, of the Act of 1883, the accused is "a person convicted on indictment" within the meaning of s. 3 of the Criminal Appeal Act, 1907, and therefore has the right of appeal given by that section.

ARGUMENT of a point of law.

The prisoner was tried before Ridley J. at the Central Criminal Court on January 12, 1910. The indictment contained two counts, the first of which charged the prisoner with wounding with intent to murder, and the second with wounding with intent to cause grievous bodily harm. The jury found him guilty on the second count, but returned a special verdict under s. 2, sub-s. 1 (1), of the Trial of Lunatics Act, 1883, that he was

(1) Trial of Lunatics Act, 1883, s. 2, sub-s. 1: "Where in any indictment or information any act or omission is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence that he was insane, so as not to be responsible, according to law, for his actions at the time when the act was done or omission made, then, if it appears to the jury before whom such person is tried that he did the act or made the omission charged, but was insane as aforesaid at the time when he did or made the same, the jury shall return a special verdict to the effect that the accused was guilty of the act or omission charged against him, but was insane as aforesaid at the time when he did the act or made the omission."

Sub-s. 2: "Where such special verdict is found, the Court shall order the accused to be kept in custody as a criminal lunatic, in such place and in such manner as the Court shall direct till Her Majesty's pleasure shall be known; and it shall be lawful for Her Majesty thereupon, and from time to time, to give such order for the safe custody of the said person during pleasure, in such place and in such manner as to Her Majesty may seem fit."

Criminal Appeal Act, 1907, s. 3: "A person convicted on indictment

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insane at the time of committing the offence, and an order was thereupon made for his detention under sub-s. 2 as a criminal lunatic.

The prisoner applied under s. 17 of the Criminal Appeal Act, 1907, to Phillimore J. for leave to appeal against his conviction, and on that application the following order was made: "The Court doth give leave in order to enable the question to be argued whether there is a right of appeal under the Act in this case . . . ."

E. Percival Clarke, for the appellant. The question is whether the special verdict returned by the jury under s. 2, sub-s. 1, of the Trial of Lunatics Act, 1883, followed by the order for detention during His Majesty's pleasure made under sub-s. 2 constitutes a conviction within the meaning of s. 3 of the Criminal Appeal Act, 1907, so as to give the prisoner a right of appeal. Before the passing of the Trial of Lunatics Act, 1883, if a prisoner was found to be insane at the time he committed the crime he was acquitted, but the effect of s. 2 of the statute is that he is convicted. The word "guilty" in that section shews that there is found to be guilt on the part of the prisoner. Clause (*d*) of r. 4 of the Criminal Appeal Rules, 1908, contemplates an application being made to this Court by a person in the position of the prisoner, the application being made by some other person authorized to act for him. If a lunatic has no right of appeal he would be deprived of the right of redress which a sane person has for an injustice done to him on his trial. [*M'Naghten's Case* (1) and s. 18 of the Criminal Appeal Act, 1907, were also referred to.]

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may appeal under this Act to the Court of Criminal Appeal—

"(*a*) against his conviction on any ground of appeal which involves a question of law alone;

"(*b*) with the leave of the Court of Criminal Appeal or upon the certificate of the judge who tried him that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or any other ground which appears to the Court to be a sufficient ground of appeal."

(1) (1843) 10 Cl. & F. 200.

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A. H. Bodkin, for the prosecution. A "criminal lunatic" is merely a convenient statutory expression to denote a person who has to be specially dealt with. Under the Criminal Lunatics Act, 1884 (47 & 48 Vict. c. 64), certain supervision is exercised over him whilst unfit to be at large, but if he becomes in a fit condition he may be set free, or if it is considered advisable he may be treated as an ordinary lunatic. Sects. 4 and 5 of that Act shew that a criminal lunatic may be under supervision even after his discharge from an asylum. His position is that he has committed an act which would have been a crime if it had been done by a person in a normal state of mind.

The object with which the Trial of Lunatics Act, 1883, was passed was to introduce more logical proceedings, namely, that instead of being acquitted the prisoner should be found guilty of the act charged and subjected to special supervision. The word "conviction" is of ambiguous meaning. It may mean the mere determination of guilt or it may mean the full legal conviction, i.e., a determination of guilt followed by sentence: *Burgess* v. *Boetefeur*. (1) The order of the Court made under s. 2, sub-s. 2, of the Trial of Lunatics Act, 1883, is not a sentence. It does not, coupled with the ascertainment of guilt, constitute a conviction which is appealable under the Criminal Appeal Act, 1907. The verdict returned under s. 2, sub-s. 1, of the Trial of Lunatics Act, 1883, is not a special verdict in the ordinary sense. It is a statutory expression which the jury must utter if they are satisfied of the existence of the conditions required by the Act of 1883. If a person is so insane that he cannot appreciate the nature and quality of his act he is not capable of forming a wrongful intention. Rule 4, clause (*d*), of the Criminal Appeal Rules, 1908, does not deal with the question whether there is a right of appeal. In the Criminal Appeal Act, 1907, the word "sentence" is always used in a punitive sense. The sentence passed under s. 2, sub-s. 2, of the Trial of Lunatics Act, 1883, is one fixed by law, and therefore s. 3, clause (*c*), of the Criminal Appeal Act, 1907, prevents there being an appeal to this Court. In *Jefferson's Case* (2) this Court ordered a conviction for murder to be quashed and that the

(1) (1844) 7 Man. & G. 481. (2) (1908) 1 Cr. App. Rep. 95.

prisoner be detained as a criminal lunatic. [The Criminal Lunatic Asylums Act, 1860 (23 & 24 Vict. c. 75), ss. 4 and 5 of the Criminal Appeal Act, 1907, and *Reg.* v. *Blaby* (1) were also referred to.]

The judgment of the COURT (Darling, Pickford, and Lord Coleridge JJ.) was delivered by

DARLING J. The question which we have to consider arises in respect of the conviction of the prisoner, who was tried upon an indictment which charged him in the first count with wounding with intent to murder and in the second count with wounding with intent to cause grievous bodily harm. The jury found him guilty of wounding with intent to cause grievous bodily harm, but they also found, in accordance with s. 2, sub-s. 1, of the Trial of Lunatics Act, 1883, that he was insane at the time of the commission of the offence. The question is whether in these circumstances the prisoner is a "person convicted on indictment" within the meaning of s. 3 of the Criminal Appeal Act, 1907. Unless he has been convicted on indictment within the meaning of that section he has no right of appeal to this Court against his conviction. An exemption from being a "person convicted on indictment" would be a curious one to allow to a person in the position of the prisoner, and one not in his favour. The result would be that whenever a jury returned the special verdict provided for by s. 2, sub-s. 1, of the Trial of Lunatics Act, 1883, the person against whom it was found would be excluded from the right of appeal given to other convicted persons by s. 3 of the Criminal Appeal Act, 1907. If that result had been intended by the Legislature one would expect to find an enactment to that effect in express terms, the more so as the word "conviction" is a word of equivocal meaning. It is worthy of observation that the language of s. 2, sub-s. 1, of the Act of 1883 is imperative. It provides that the jury shall return the special verdict and not simply a verdict of guilty or not guilty. In the early days of trial by jury a special verdict was the ordinary one which the jury gave. The jury always had and still has the right in every case to return a special verdict

(1) [1894] 2 Q. B. 170.

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unless there has been express provision to the contrary made by the Legislature. In Hawkins' Pleas of the Crown, 8th ed., bk. 2, ch. 47, s. 3, p. 619, it is said that "it is settled that the jury may give a special verdict in any criminal case, whether capital or not capital, as well as in a civil." The author quotes several authorities for that proposition and then refers to a passage in Kelyng's Reports as saying in effect that "it is dishonourable for the Court to suffer a special verdict in a plain case." We need not, however, consider that point, for s. 2, sub-s. 1, of the Trial of Lunatics Act, 1883, says that the jury shall return a special verdict. The same point has been commented upon in Hale's Pleas of the Crown. In vol. 2, p. 301, it is said that "the jury may find a special verdict, or may find the defendant guilty of part, and not guilty of the rest, or may find the defendant guilty of the fact, but vary in the manner." That is very like what the jury are required to do by s. 2, sub-s. 1, of the Trial of Lunatics Act, 1883. In Sir Michael Foster's Crown Law (a very authoritative work on criminal law), 3rd ed., s. 1, p. 279, it is said that "though the jury may, and have been formerly directed in cases of infancy and insanity to find the special matter, whereupon the Court is to give judgment of acquittal, yet, under the direction of the Court, they may find a general verdict of acquittal without this circuity. This rule is founded in sound reason and substantial justice. For undoubtedly crimen non contrahitur nisi voluntas nocendi intercedat." It is therefore clear that in former days if a prisoner did the act charged against him but was insane at the time the act was done the jury might return either a special verdict or a verdict of not guilty, and the Court would allow the prisoner to go free until the passing of the Criminal Lunatics Act, 1800 (39 & 40 Geo. 3, c. 94), by which the jury were required to find specially whether a person charged with treason, murder, or felony "was insane at the time of the commission of such offence, and to declare whether such person was acquitted by them on the ground of insanity," and if they found that he was insane at the time of committing the offence, the Court was to order him to be kept in custody till the Crown's pleasure was known. That provision was repealed by the Trial of Lunatics Act, 1883, under which the jury are bound to return

the special verdict of guilty but insane at the time of the act or omission. Totally different consequences result from that verdict to those which followed from a verdict of not guilty under the old law before the Act of 1800. By sub-s. 2 of s. 2 of the Act of 1883 where the special verdict is found the Court must order the accused to be kept in custody as a criminal lunatic until the pleasure of the Crown be known. The question therefore arises whether the provisions contained in s. 2 of the Trial of Lunatics Act, 1883, result in the person being convicted within the meaning of s. 3 of the Criminal Appeal Act, 1907. It is clear that the special verdict returned under the Act of 1883 is not equivalent to a verdict of not guilty, for it is to the effect that the accused was guilty of the act or omission charged against him but was insane at the time when he did it. That provision is substituted for the old form in which the jury might have returned either a special verdict or a verdict of not guilty, and upon that special verdict being found by the jury under the Act of 1883 the prisoner is to be treated as a criminal lunatic. If a person against whom this special verdict has been found were indicted a second time for the same offence and pleaded autrefois acquit the verdict would not support the plea inasmuch as he was found guilty, and the result would be that if he could not plead autrefois convict he would be liable to be tried again, and in the case of murder possibly hanged. It is impossible to suppose that the Legislature intended that that result should ensue. The question is what is the meaning of the word "conviction" in s. 3 of the Criminal Appeal Act, 1907. In Blackstone's Commentaries, 8th ed., vol. 4, p. 361, it is said that "if the jury find" the prisoner "guilty he is then said to be convicted of the crime whereof he stands indicted. Which conviction may accrue two ways; either by his confessing the offence and pleading guilty; or by his being found so by the verdict of his country." In that passage the words "found so" mean found guilty, which is what the jury have to find with respect to the person against whom they return the special verdict directed by s. 2, sub-s. 1, of the Trial of Lunatics Act, 1883. In *Burgess* v. *Boetefeur* (1) Tindal C.J.

(1) 7 Man. & G. 481.

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said: "The word 'conviction' is undoubtedly verbum æquivocum. It is sometimes used as meaning the verdict of a jury, and at other times, in its more strictly legal sense, for the sentence of the Court. In the passages cited from Blackstone's Commentaries, the term seems to be used in both senses."

Therefore the words "convicted" and "conviction" are of no very precise meaning, and the question is whether they may include the result which ensues when the jury return the special verdict in accordance with the provisions of s. 2, sub-s. 1, of the Trial of Lunatics Act, 1883, and the order is thereupon made under sub-s. 2. We are of opinion that the special verdict and the order thereupon made under the Trial of Lunatics Act, 1883, amount to a conviction within the meaning of the Criminal Appeal Act, 1907, and the Criminal Appeal Rules, 1908, and that a prisoner against whom the verdict passes and the order is made is "a person convicted on indictment" within the meaning of s. 3 of that Act and has a right of appeal against his conviction to this Court. We grant leave to appeal against the conviction under s. 3, clause (*b*), of the Criminal Appeal Act, 1907.

Leave to appeal granted.

Solicitor for appellant: *Registrar of the Court of Criminal Appeal.*

Solicitor for the prosecution: *Director of Public Prosecutions.*

J. E. A.

In re SEED.
Ex parte KING.

1910
March 7.

Money-lender—Carrying on Business at Registered Address—Loan made through the Post—Illegality—Money-lenders Act, 1900 (63 & 64 *Vict. c.* 51); *s.* 2, *sub-s.* 1 (*b*).

The terms of a loan having been arranged by correspondence between the borrower and a money-lender, the latter sent to the former an unsigned promissory note, which the borrower signed and returned to the money-lender, who then sent to the borrower a cheque for the amount of the loan. The money-lender's letters, the unsigned promissory note, and the cheque were all sent by post from the money-lender's registered address to the borrower's residence :—

Held, that the business of the loan had been carried on by the money-lender at his registered address within s. 2, sub-s. 1 (*b*), of the Money-lenders Act, 1900.

APPEAL by the petitioning creditor from the refusal of the registrar of the Preston County Court to make a receiving order.

The appellant was a duly registered money-lender, his registered address being 11, Cork Street, London. In January, 1910, he presented a bankruptcy petition against the respondent in the Preston County Court. The act of bankruptcy was the execution by the respondent of a deed of assignment for the benefit of his creditors. The appellant's alleged debt was 64*l.* due on the respondent's dishonoured promissory note given by him to the appellant in consideration of a loan. The respondent, who resided in Lancashire, had received one of the appellant's business circulars, and he applied to him by letter for a loan. Negotiations were carried on by correspondence, and, terms having been arranged, the appellant sent an unsigned promissory note to the respondent. He signed it and returned it to the appellant, who then forwarded by post a cheque for the amount of the loan, which the respondent paid into his bank. The whole of the business was carried out by correspondence between the appellant, writing from his registered address, and the respondent, at his residence.

The registrar held that the transaction had not been carried out at the appellant's registered address within the meaning of s. 2, sub-s. 1 (*b*), of the Money-lenders Act, 1900, and that there

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was, therefore, no valid debt, and he accordingly dismissed the petition.

Shearman, K.C. (*T. E. Mansfield* with him), for the appellant. The petitioning creditor has a valid debt. The registrar appears to have thought that this case was governed by *Gadd* v. *Provincial Union Bank* (1), but that case is distinguishable because there the whole transaction was carried out and completed at the borrower's residence, whereas in the present case everything that the money-lender did was done by him at his registered address, and although the cheque was sent by post to the borrower's residence and the promissory note was signed by him there, those facts do not cause the transaction to be one which was not carried out at the money-lender's registered address, for, as was pointed out by Darling J. in *Jackson* v. *Price* (2), a money-lender may carry on his business at his registered address though every single part of the transaction may not be completed there. In *Levene* v. *Gardner* (3) Phillimore J. said that signing a promissory note elsewhere than at the money-lender's registered office did not render the transaction void; and the judgment of Bray J. in *Sadler* v. *Whiteman* (4) is also in the appellant's favour.

[He was stopped.]

Hansell, for the respondent. In *Sadler* v. *Whiteman* (4) Bray J. said that *Gadd* v. *Provincial Union Bank* (1) was "a decision that if no part of the transaction takes place at the money-lender's office, but the money-lender goes round like a pedlar to sell his wares, then the business is not being carried on at his registered address." That is exactly what was done here, except that the money-lender, instead of going in person, sent his circular. The transaction of this particular loan was entirely carried on at the borrower's residence, because the promissory note was signed by him there and the cheque was received by him there. If the cheque had been lost in the post and had never been received by the borrower there would have been no completed transaction. The interpretation placed upon the section in *Gadd* v. *Provincial*

(1) [1909] 2 K. B. 353.
(2) Ante, p. 143.
(3) (1909) 25 Times L. R. 711.
(4) (1910) 26 Times L. R. 255.

Union Bank (1), and recognized by Phillimore J. in *Levene* v. *Gardner* (2) and by Darling J. in *Jackson* v. *Price* (3), is that some substantial part of the transaction, either the interviews or the signing of the promissory note or the receipt of the money, must take place at the money-lender's office. In this case not one of those things took place there, and the transaction is therefore void. [He referred to *Lazarus* v. *Gardner*. (4)]

PHILLIMORE J. The question in this case is whether there is a good petitioning creditor's debt. The petitioning creditor is a money-lender, and it is contended that he has not complied with s. 2, sub-s. 1 (*b*), of the Money-lenders Act, 1900, and that there is therefore no valid debt due to him from the debtor. Sect. 2, sub-s. 1 (*b*), enacts that a money-lender "shall carry on the money-lending business in his registered name, and in no other name and under no other description, and at his registered address or addresses, and at no other address." There have been several decisions on that section, which shew that for the purpose of deciding this case we have to consider not what is the general practice of the money-lender, but what he has in fact done in this case. If a particular transaction was carried out elsewhere than at the money-lender's registered address it will not stand, even though the money-lender does generally carry on his business at his registered address; on the other hand, if the particular transaction was carried on at the registered address, it is immaterial that the money-lender generally carries on his business elsewhere. In other words, the section is to be construed to mean that he shall carry on his money-lending business at his registered address. Now what has happened here? The money-lender had a registered name and a registered address. He sent out a circular inviting people to borrow money from him. I suppose he had an address on that circular which was his registered address, and if the debtor had not written to that registered address the transaction would never have gone through and never even would have begun. The money-lender, having received a reply to his circular, then

(1) [1909] 2 K. B. 353.
(2) 25 Times L. R. 711.
(3) Ante, p. 143.
(4) (1909) 25 Times L. R. 499, 719.

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SEED, *In re.* KING, *Ex parte.*

Phillimore J.

entered into correspondence, giving as his address his registered address, and eventually a transaction was arrived at and completed entirely by correspondence. The debtor wrote to the money-lender at his place of business, and the money-lender from his place of business sent letters agreeing to the debtor's terms, or, on receiving a letter agreeing to his terms, sent a promissory note to be signed by the debtor at his residence, and, when he received it back, sent a cheque in favour of the debtor to be cashed by the debtor when he received it at his private address. If this transaction sins against the Act the result is that no transactions by post would stand. When I say transactions by post I mean transactions wholly by post, and that, broadly speaking, is what Mr. Hansell's argument comes to. If that were the correct view the Act of Parliament would be a snare for everybody, but I do not think the Legislature could have meant that, and—remembering my brother Darling's words in *Jackson* v. *Price* (1), that the result is not merely that the transaction is void, but that the money-lender is subject to a heavy penalty as a criminal—in my opinion we should be doing very wrong to construe the section in that way. I am of opinion, therefore, that this appeal must be allowed.

BUCKNILL J. I agree.

Appeal allowed.

Solicitor for appellant: *W. B. Glasier.*

Solicitors for respondent: *Chester & Co., for James Craven & Son, Preston.*

(1) Ante, p. 143.

F. O. R.

MARTIN, Appellant *v.* WHITE, Respondent.

1910
Jan. 12.

Motor Car—Exceeding Speed Limit — Indorsement of Licence — Previous Convictions—Evidence of Identification—Contents of Licence—No Notice to produce—Identity of Name and Address—"Proof of the identity"—Prevention of Crimes Act, 1871 (34 & 35 *Vict. c.* 112), *s.* 18—*Motor Car Act*, 1903 (3 *Edw.* 7, *c.* 36), *ss.* 3, 4, 9.

The appellant, Lionel Walker Birch Martin, of Ryder Street Chambers, St. James's Street, London, who held a licence to drive a motor car issued by the London County Council and numbered 5080, was in 1909 convicted by a Court of summary jurisdiction of driving a motor car on a public highway at a speed exceeding twenty miles an hour contrary to s. 9 of the Motor Car Act, 1903. It was then proved that the driver of a motor car of the name of Lionel Martin and of the same address as the appellant had been convicted of a similar offence in 1907; and that a person having the same four names and of the same address as the appellant had held a licence from the London County Council from a date before 1907 continuously down to the present time, that the licence was numbered 5080, and that no one having a London address could have that number except the person having those four names and that address. A police constable gave evidence that he stopped the motor car upon the occasion in 1907, and the driver upon demand produced to him a licence which was issued by the London County Council and numbered 5080. No notice to produce the licence was given. It was next proved by the production of a certified copy of the conviction that a person with the same four names and of the same address as the appellant was convicted of a similar offence in 1908. The appellant, who was represented by counsel at the hearing, absented himself from the Court and was not called as a witness. The justices found upon the above evidence that the appellant was the person who had been convicted on both the former occasions, and they imposed a fine of 20*l.* and ordered his licence to be indorsed:—

Held that, with regard to the conviction in 1907, the evidence of the police constable as to the contents of the licence produced to him on the occasion when the offence was committed was admissible as evidence of the identity of the appellant with the person who was then convicted, and that no notice to produce the licence was necessary; that, with regard to the conviction in 1908, the identity of the names and of the address was some evidence of the identity of the appellant with the person who was then convicted; and that the justices were entitled to have regard to the appellant's wilful absence, and conclude that he was the person who was convicted on both those occasions and to order his licence to be indorsed.

"Proof of the identity" of the person against whom it is sought to prove the conviction with the person named in the record of the

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conviction, required by s. 18 of the Prevention of Crimes Act, 1871, does not mean conclusive proof, but means such evidence as will entitle a jury to find that the identity is proved.

CASE stated by justices acting in and for the borough of Richmond in the county of Surrey.

At a Court of summary jurisdiction sitting in and for the borough of Richmond an information was laid by the respondent, an inspector of the metropolitan police, against the appellant, Lionel Walker Birch Martin, for that he the appellant on April 15, 1909, did unlawfully drive a motor car on a certain public highway at a speed exceeding twenty miles per hour contrary to s. 9 of the Motor Car Act, 1903.

The information came on for hearing on May 6, 1909, when the justices were informed by the inspector of police on duty in Court that the case was one in which it was necessary to identify the person summoned. The justices ascertained that the appellant was not then present, and the counsel who appeared for him informed the justices that the appellant was not so present on his (counsel's) advice. The justices accordingly adjourned the further hearing of the information to May 13, when the respondent was represented by the solicitor to the Commissioner of Police and the appellant by the same counsel as before.

It was then proved that the summons issued upon the information had been duly served upon the appellant on May 3, 1909, by warrant officer Taylor by leaving it with the appellant's servant at 3, Ryder Street Chambers, St. James's Street, London. It was further proved that the appellant was on April 15, 1909, driving a motor car along Kew Road, in the borough of Richmond, at a speed of 26 miles 828 yards per hour, and that the officers then engaged in timing the car stopped him and asked for his licence, which was produced, and the following particulars were taken from it: "Issued by the London County Council; Licensee, Lionel Walker Birch Martin; Address, 3, Ryder Street Chambers, St. James's Street, S.W.; Number 5080; Date 4th March, 1909, expiring 3rd March, 1910." The facts upon which the charge was made were not disputed by the appellant's counsel, nor was any evidence called

upon the appellant's behalf. The justices came to the conclusion that the offence charged was proved against the appellant, and as they were informed that there were previous convictions of the appellant under s. 9 of the Motor Car Act, 1903, and as the appellant was not then personally present, upon the application of the respondent's solicitor they issued a warrant for the apprehension of the appellant in order that he should be personally present when evidence of his previous convictions was being tendered, the previous convictions not being admitted by the appellant's counsel, and no undertaking being given by his counsel that the appellant would be present at any further adjournment of the information. The warrant so granted was upon June 17, 1909, quashed by the King's Bench Division of the High Court of Justice. (1)

The information came again before the Court of summary jurisdiction on July 8, 1909, when the appellant was not present, but was represented by counsel as on the two former hearings. In the opinion of the justices the appellant on the occasion of each of the three hearings absented himself from the Court intentionally and on the advice of his counsel. It was then proved by Thomas Bristow, of the West Sussex police, who was timing motor cars at Crawley, in Sussex, on May 11, 1906, that he stopped a car on that day; that he had a conversation with the driver thereof, who produced to him upon demand a licence, and that he, Bristow, gave evidence afterwards before a Court of summary jurisdiction sitting at Horsham against the driver of the car so stopped by him; and that the driver was convicted of having on May 11, 1906, unlawfully driven on a public highway at Crawley a motor car at a speed exceeding twenty miles, to wit, thirty-one miles, per hour contrary to the Motor Car Act, 1903. Bristow produced a certified copy of the conviction (marked A), which stated that "Lionel Walker Birch Martin, of Chelsea, London (hereinafter called the defendant), is this day convicted for that he on the 11th day of May, 1906, at Crawley, in the said county of Sussex, on a certain public highway there situate did unlawfully drive a certain motor car at a speed exceeding

(1) See *Rex* v. *Thompson*, [1909] 2 K. B. 614.

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twenty miles, to wit, thirty-one miles, an hour," and he was fined 1*l.* 1*s.* and ordered to pay 1*l.* 10*s.* 6*d.* for costs.

It was further proved by police sergeant Baker that on May 16, 1907, he was engaged in timing motor cars near Barnet, in the county of Hertford, and stopped a car which was then being driven on a public highway; that a licence was produced to him by the driver thereof at his request; and that on June 5, 1907, he gave evidence against the driver before a Court of summary jurisdiction sitting at Barnet, before which the driver was convicted of having driven the motor car on the highway at a speed exceeding twenty miles per hour. Baker produced a certified copy of the conviction (marked B), which stated that "Lionel Martin, of Ryder Street Chambers, St. James's Street, S.W. (hereinafter called the defendant), is this day convicted for that he on the 16th day of May, 1907, at the parish of Barnet Vale . . . . did unlawfully drive a motor car on a public highway . . . . at a speed exceeding twenty miles an hour," and he was fined 8*l.* and ordered to pay 5*s.* 6*d.* for costs. Baker on May 16, 1907, took particulars from the licence produced to him by the driver of the motor car, and he was asked by the respondent's solicitor to give in evidence the said particulars. The appellant's counsel objected to the admissibility of such particulars. The justices were of opinion that evidence from Baker as to the particulars taken from the licence was not at that stage of the hearing admissible. There was then called before the justices the registration officer of the London County Council, who gave evidence that one Lionel Walker Birch Martin, of 3, Ryder Street Chambers, St. James's Street, S.W., had held from the London County Council a licence to drive a motor car since February 13, 1904, continuously down to the present time, with the exception of the period from February 12, 1906, to March 2, 1906; that the licence was renewed annually to him in that name; that the number during the whole period of the licence since February 13, 1904, was 5080, and that there was no other person of the name of Lionel Walker Birch Martin in the register of such licences kept by the London County Council; and that no one giving a London address for the purposes of registration under the Motor Car Act, 1903, could have the number 5080 except the person

named Lionel Walker Birch Martin, of 3, Ryder Street Chambers, St. James's Street, S.W. The said registration officer, who produced the register of the London County Council, said that the issue of a licence bearing the same number to each of two different persons had never to his knowledge occurred.

The justices were of opinion that the person summoned before them was the person who throughout the period of the licence was licensed in the name of Lionel Walker Birch Martin and was the person driving the car stopped by Sergeant Baker. They therefore, on Sergeant Baker being recalled, admitted the evidence of the particulars taken by him of the licence produced by the driver of the car on May 16, 1907, which was that the number of the licence so produced was 5080 and that it had been issued by the London County Council. No notice to produce the licence had been served upon the appellant.

It was further proved by the said Thomas Bristow that he was on duty timing motor cars on January 5, 1908, at Crawley, and that he stopped the same car which he had stopped on May 11, 1906, and which was being driven by the same person as had been driving it on May 11, 1906; that he gave evidence against the driver before a Court of summary jurisdiction sitting at Horsham; and that the driver was convicted of unlawfully driving on a public highway a motor car at a speed exceeding twenty miles, to wit, thirty-nine miles, per hour contrary to the Motor Car Act, 1903. Bristow produced a certified copy of the conviction (marked C), which stated that "Lionel Walker Birch Martin, of Ryder Street, St. James's, London, S.W. (hereinafter called the defendant), is this day convicted for that he on the 5th day of January, 1908, at Ifield . . . . on a certain public highway there situate did unlawfully drive a certain motor car at a speed exceeding twenty miles, to wit, thirty-nine miles, an hour," and he was fined 7*l.* 10*s.* and ordered to pay 11*s.* 3*d.* for costs.

Upon the above facts it was contended on behalf of the appellant that as regards the two convictions of which A and C were the certified copies there was no legally admissible evidence upon which the justices could hold that the appellant was the person who was convicted on either occasion; that the

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certified copies A, B, and C of the convictions were in themselves insufficient to afford evidence on which the justices could act to prove that the appellant was the person convicted on any of those occasions, and s. 18 of the Prevention of Crimes Act, 1871, was cited as an authority for such submission; and with regard to the conviction at Barnet (marked B) that the evidence of Baker giving the contents of the licence produced to him on May 16, 1907, was not legally admissible or admitted.

It was contended on behalf of the respondent that the evidence of Baker as to the contents of the licence produced to him on May 16, 1907, was legally admissible, having regard to the decision in *Marshall* v. *Ford* (1); and that with regard to each of the three convictions, of which A, B, and C were certified copies, the evidence of the registration officer of the London County Council and the fact that the summons issued on the information before the justices was addressed to Lionel Walker Birch Martin, of 3, Ryder Street Chambers, St. James's Street, S.W., and had been there duly served, and that counsel representing the person so summoned answered and appeared to the information, and the other facts proved before the justices hereinbefore set forth, were evidence upon which the justices could in law find that the appellant had been on the said three occasions previously convicted of offences against s. 9 of the Motor Car Act, 1903.

The justices were of opinion that there was legally admissible evidence before them that the appellant was the person who had on each of the three occasions mentioned in the three certified copies of the convictions, marked A, B, and C respectively, been so convicted, and they imposed a fine of 20*l.*, and in pursuance of s. 4 of the Motor Car Act, 1903, they ordered the conviction of the offence charged in the information to be indorsed on the licence held by the appellant under the Motor Car Act, 1903.

The questions for the Court were:

(1.) Whether there was any legally admissible evidence before the justices from which they could come to the conclusion that the appellant was the person convicted on the occasions

(1) (1908) 72 J. P. 480.

mentioned in the certified copies A, B, and C respectively or on any two of such occasions.

(2.) Whether the evidence of Sergeant Baker was properly admitted.

If the Court should be of opinion that there was legally admissible evidence as to the appellant being the person who was convicted as shewn in the certified copies marked A and C, the conviction was to stand. If the Court should be of opinion that there was legally admissible evidence to shew that the appellant was the person convicted on one only of such occasions as were referred to in the certified copies marked A and C, and if the evidence of Sergeant Baker was properly admitted and there was legally admissible evidence from which the justices could hold that the appellant had been convicted on the occasion referred to in the certified copy marked B, then the conviction was to stand; if otherwise, the conviction was to be quashed.

Danckwerts, K.C. (*Lord Tiverton* with him), for the appellant. There was no such proof of identity of the appellant with the person who was convicted on any of the three previous occasions as is required by s. 18 of the Prevention of Crimes Act, 1871. With regard to the two convictions marked A and C there was no evidence of identity. There was no evidence beyond the mere production of the certified copies of the convictions. Sect. 18 of the Act requires proof of identity to be given as well as the production of a record of the conviction. That means that external evidence of identity must be given, and no such evidence was given here. There was therefore no sufficient evidence of identity of the appellant with the persons who were convicted on those two occasions. With regard to the conviction at Barnet, marked B, the evidence of identity was not sufficient to satisfy the section. The conviction only shewed that a person of the name of Lionel Martin, of the same address as the appellant, was convicted. The evidence of the police constable who stopped the car upon that occasion, and to whom the driver produced a licence, as to the contents of that licence was not admissible. Secondary evidence as to the contents of a document is not admissible unless notice

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to produce the original has been given, and the rule is the same in civil and in criminal cases: *Rex* v. *Watson* (1); *Attorney-General* v. *Le Merchant* (2); *Goodered* v. *Armour* (3); Taylor on Evidence, 10th ed., s. 440. The general rule is that what is in a writing can only be proved by the writing itself: *The Queen's Case* (4); *Vincent* v. *Cole*. (5) The present case is not within any of the three exceptions stated in *Colling* v. *Treweek* (6) to the rule that a copy of a document is not admissible unless notice to produce the original has been given. A defendant in a criminal case has a right to rely upon the strict rules of evidence, and he is not bound to render any assistance to the prosecution in making out their case. The decision of this Court in *Marshall* v. *Ford* (7), that it is not necessary to give to the driver of a motor car, who is being prosecuted for exceeding the speed limit, notice to produce his licence so as to let in secondary evidence of its contents, was decided by inadvertence and ought not to be followed. Even if notice to produce the licence was not necessary, secondary evidence of its contents was not admissible until the identity of the person who then produced the licence with the appellant was proved: *Corfield* v. *Parsons*. (8) The mere production of a licence by the driver of a motor car does not prove the identity of the person named therein. Sect. 1, sub-s. 2, of the Motor Car Act, 1903, empowers a police constable to apprehend without warrant the driver of a car who commits within his view an offence under that section, namely, reckless driving, if he refuses to produce his licence on demand. That sub-section therefore does not apply, because the conviction in the present case and the previous convictions were under s. 9 of the Act for exceeding the speed limit. Sect. 3, sub-s. 4, empowers a police constable to require a driver of a motor car to produce his licence to him, but the offence aimed at in that section is driving without a licence, and the requirement as to the production of the licence is only to enable the constable to see if the driver has a licence to drive, and not for the purpose of identifying the driver. Sect. 9

(1) (1788) 2 T. R. 199, at p. 201.
(2) (1772) 2 T. R. 201n, at p. 203n.
(3) (1842) 3 Q. B. 956.
(4) (1820) 2 Brod. & B. 286.
(5) (1828) Moo. & M. 257.
(6) (1827) 6 B. & C. 394, at p. 398.
(7) 72 J. P. 480.
(8) (1833) 1 Cr. & M. 730.

deals with the offence of exceeding the speed limit, and there is nothing in that section with reference to the production by the driver of his licence. The evidence here only shewed that somebody who was afterwards convicted produced a licence to a police constable on May 16, 1907, at Barnet. Before the contents of that licence can be given in evidence against the appellant the identity of the two persons must be proved. Therefore the contents cannot be given in evidence as proof of identity. In *Simpson* v. *Dismore* (1) the plaintiff, who was an apothecary, produced the original licence granted by the Apothecaries' Company to a person bearing the christian name and surname of the plaintiff, and the Court held that that was evidence to shew the identity of the plaintiff with the person named in the licence. In that case the original licence was produced by the plaintiff himself in support of his own case, and therefore that decision has no application to the present case. The production of a licence by the driver of a motor car is not prima facie evidence that he is the person named therein : it is not a statement by him that he is the person named therein. He may have been wrongfully carrying another person's licence at the time. The evidence of the registration officer of the London County Council does not carry the case further, because there is no evidence that the document spoken to by him was the same document as was produced to the police constable at Barnet, except the statement of the constable as to its contents, which is not admissible until the identity was proved. The prosecution cannot advance a step until they first prove identity. The decision of the justices was therefore wrong.

Horace Avory, K.C. (*Bodkin* with him), for the respondent. The question is whether there was any evidence before the justices which entitled them to come to the conclusion that the appellant was the person who had been twice previously convicted. In considering that question the justices were entitled to take into consideration the fact that the appellant, knowing what the question before the justices was, deliberately absented himself from the Court and refused to give evidence. In such a case the justices would accept evidence of a much lighter degree than

(1) (1841) 9 M. & W. 47.

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they would accept if the appellant was there to contradict it: per A. T. Lawrence J. in *Rex* v. *Thompson*. (1) The appellant here, knowing the issue before the justices, absented himself intentionally from the Court, and no application was made on his behalf for an adjournment to enable him to answer the case made against him. By the combined operation of the Motor Car Act, 1903, and of the Motor Car (Registration and Licensing) Order, 1903, made by the Local Government Board, three things are clear. No person is entitled to drive a motor car without a licence from the county or borough council where he resides; each licence when granted by a county or borough council has a distinctive number; and every driver of a motor car must carry his licence with him when he is driving and must produce it to a police constable on demand. No question really arises here as to notice to produce or as to the right to give secondary evidence in the absence of such a notice. Even if it did arise, the case would be governed by the decision in *Marshall* v. *Ford*. (2) The only question is whether there was evidence of identity of the appellant with the person who was convicted on any two of the former occasions. With regard to the Barnet conviction, marked B, the production of the licence with its distinctive number was some evidence of the identity of the driver with the appellant, who had a licence bearing the same number. The evidence of the registration officer of the London County Council shewed that a licence with that number was renewed annually to a person of the same name and address during the material period of time. A licence to drive a motor car is like a cabman's badge or a policeman's number on his collar, which are both marks of identification. The production of a licence is not the production of a document; it is the production of an article, like a mark or badge, and therefore the number 5080 was some evidence of identity of the appellant with the person who was convicted at Barnet, and the appellant might have answered that evidence, but deliberately abstained from doing so.

With regard to the convictions marked A and C there was no evidence as to the number of the licence, the only evidence being the production of the convictions. The rule of evidence as

(1) [1909] 2 K. B. 614, at p. 622. (2) 72 J. P. 480.

to identity is the same in criminal as in civil cases. Identity of name and address is some evidence of identity, especially so if the name is uncommon: *Simpson* v. *Dismore* (1); *Greenshields* v. *Crawford* (2); *Russell* v. *Smyth* (3); *Roden* v. *Ryde* (4); Taylor on Evidence, 10th ed., ss. 1858, 1860. In both the convictions A and C the names, Lionel Walker Birch Martin, are the same as the appellant's names. This combination of names is uncommon, and the address of the person convicted on the last of these occasions (conviction C) was the same as the appellant's address. Those matters afford some evidence of the identity of the appellant with the person who was then convicted. This evidence the appellant did not go into the witness-box to answer. The police constable who stopped the motor car on that last occasion stated that the driver was the same person whom he had stopped on the occasion of the first conviction. There was therefore evidence, upon which the justices were entitled to act, of the identity of the appellant with the person who was convicted upon both those occasions. The result is that the justices were entitled to draw the conclusion that the identity of the appellant with the person convicted on each of the three previous occasions was made out.

Danckwerts, K.C., in reply. The cases cited for the respondent are not applicable. The mere fact that the name and address of the appellant are the same as in the record or extract of the previous conviction is not proof of identity under the Prevention of Crimes Act, 1871. There must be proof of identity outside the record or extract produced. Sect. 18 requires more than prima facie evidence of identity; it requires "proof of the identity," and that is made a condition precedent to the proof of the previous conviction.

LORD ALVERSTONE C.J. In this case the appellant is Lionel Walker Birch Martin, who resides at 3, Ryder Street Chambers, St. James's Street, London, and was on May 13, 1909, convicted of having on April 15 driven a motor car along the Kew Road

(1) 9 M. & W. 47.
(2) (1842) 9 M. & W. 314.
(3) (1842) 9 M. & W. 810, at pp. 818, 819.
(4) (1843) 4 Q. B. 626, at pp. 632—634.

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at a speed exceeding twenty-six miles an hour. At that hearing it was admitted that the appellant, whose name and address were those given above, was driving the motor car; the appellant was not personally present in Court, but appeared by counsel, and the justices found that the charge had been proved against him. The justices thereupon, upon being informed that the prosecution desired to prove previous convictions against him under s. 9 of the Motor Car Act, 1903, and for that purpose to identify the appellant as the person who had been so convicted, issued a warrant for his apprehension so as to ensure his presence in Court when the evidence as to the previous convictions was being given. An application was thereupon made to quash the warrant, and this Court thought (1) that, as the appellant had appeared by counsel, the justices had no jurisdiction to issue a warrant for the purpose of compelling him to attend in Court that he might be identified, and the warrant was accordingly quashed. The case came again before the justices, and the appellant, who appeared by the same counsel as on the previous occasion, was not personally present at the hearing. It is truly said that, according to the law of England, a person who is charged with a criminal offence is not bound to render any assistance to the prosecution in making out the case against him; it is for the prosecution to prove their case. The justices, having on the former hearing adjudged that the charge of having driven a motor car on April 15, 1909, at a speed exceeding twenty miles an hour was proved, had only to consider the question whether the previous convictions or any of them were proved against the appellant, and they proceeded to hear the case upon that footing, and heard it, if I may say so, with very great care.

The prosecution sought to prove three previous convictions against the appellant, and in order to justify the imposition of a fine of 20*l.* one previous conviction for the offence of exceeding the statutory limit of speed had to be proved, and in order to justify the indorsement of the conviction on the licence proof of two previous convictions was necessary. The first conviction sought to be proved was that of a person of the name of Lionel

(1) *Rex* v. *Thompson*, [1909] 2 K. B. 614.

Walker Birch Martin, of Chelsea, who was convicted of driving a motor car at Crawley on May 11, 1906, at a speed exceeding twenty miles an hour. The second conviction was that of a person named Lionel Martin, of Ryder Street Chambers, St. James's Street, who was convicted of a similar offence at Barnet on May 16, 1907; and the third conviction was that of a person named Lionel Walker Birch Martin, of Ryder Street, St. James's, who was convicted of a similar offence at Ifield on January 5, 1908.

I propose to deal with the second of the above-mentioned convictions first. The evidence relevant to that conviction was that given by Sergeant Baker. Baker was the police officer who had been engaged in timing motor cars at Barnet on May 16, 1907. He stated in his evidence that upon that date he stopped a motor car, and upon his request the driver, who was afterwards convicted as above mentioned, produced a licence to him. He took particulars of the licence, and he was asked to give those particulars. To the admission of this evidence objection was taken on behalf of the appellant, and the justices declined to admit those particulars at that stage of the hearing. Thereupon the prosecution called a witness from the London County Council, who proved that a licence numbered 5080 had been continuously, except for a few days not material to this case, issued to Lionel Walker Birch Martin, of 3, Ryder Street Chambers, St. James's Street, from February, 1904, down to the present time, that there was no other person of that name in the register of licences kept by the London County Council, and that a licence with that number would not be issued by the council during that period to any person giving a London address other than the person who bore those four names. That is important because the point was made on behalf of the appellant that mere identity of name was not sufficient, inasmuch as several persons might well have the same names. Therefore the number of the licence as pointing to the same individual is of great importance. The justices thereupon admitted the evidence of Baker as to the particulars contained in the licence produced to him on May 16, 1907, at Barnet, that the number of the licence was 5080, and that it had been issued by the London County Council.

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It is contended on behalf of the appellant, quite independently of any question as to the necessity of a notice to produce, that the evidence of Baker as to the contents of the document produced to him at Barnet by the driver of the car which was then stopped was not admissible, because there was no proof that the driver was the appellant. That contention is not consistent with the judgment of this Court in *Marshall* v. *Ford* (1), but I wish to state the reasons why, in my opinion, that contention is not sound. It seems to me to be quite plain that, whatever other object the Legislature may have had in requiring a driver of a motor car to take out a licence, it certainly intended that a licence should be the means of identifying the person who is driving the car. We are dealing with an Act which authorizes the driving of motor cars at high rates of speed along public highways, and which at the same time contains provisions for the protection of the public. Sect. 1, sub-s. 2, of the Motor Car Act, 1903, has no direct bearing upon this case; but at the same time it is of importance as shewing, in the interests of the public and for facilitating the prosecution of offenders, that the Act intends the licence to be the means of identifying the driver of a motor car. That sub-section provides that "any police constable may apprehend without warrant the driver of any car who commits an offence under this section within his view, if he refuses to give his name and address or produce his licence on demand." It is said, and I think with some force, that that particular requirement is only to ensure the production of the licence where the driver commits the graver offence of driving to the public danger. But s. 3 shews that the requirement as to production of the licence is not confined to that particular case. It is contended on behalf of the appellant that s. 3 only deals with the offence of driving without a licence. To my mind it is impossible to say that s. 3 is intended to limit the protection afforded to the public to the mere purpose of seeing whether the driver has a licence to drive. In my opinion counsel for the respondent correctly stated the effect of s. 3 of the Act and the Local Government Board Regulations made

(1) 72 J. P. 480.

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under s. 7, namely, that no person is entitled to drive a motor car without a licence, that every licence must have a distinctive number, and that every driver of a motor car must carry his licence with him when driving, and must produce it when called upon by a police constable to do so. Sect. 3, sub-s. 1, says: "A person shall not drive a motor car on a public highway unless he is licensed for the purpose under this section, and a person shall not employ any person who is not so licensed to drive a motor car. If any person acts in contravention of this provision he shall be guilty of an offence under this Act." By sub-s. 2, "The council of a county or county borough shall grant a licence to drive a motor car to any person applying for it who resides in that county or county borough on payment of a fee of five shillings, unless the applicant is disqualified under the provisions of this Act." By sub-s. 4, "A licence must be produced by any person driving a motor car when demanded by a police constable. If any person fails so to produce his licence, he shall be liable on summary conviction in respect of each offence to a fine not exceeding five pounds." That sub-section cannot, in my opinion, mean that the obligation upon a motor car driver to produce his licence is merely for the purpose of seeing whether the driver has a licence to drive a car. In *Marshall* v. *Ford* (1) it seemed to us that one of the objects for which the Act requires the production of the licence is to afford a means, in the interests of the public, for the identification of the driver, without which proceedings cannot be taken against him, because in most cases the constable cannot know the name of the driver. As I said in *Marshall* v. *Ford* (1), "when in the course of his duty a constable acting under the Act gets the name of a person who afterwards appears in Court, that is evidence on which the magistrates may act." In that passage I did not mean to limit it to appearance personally in Court. I meant appearance in the proceedings, and that is apparent from what I said in the subsequent case of *Rex* v. *Thompson* (2), where we laid it down that personal appearance is not necessary in the case of a summons before justices for an offence punishable on summary conviction, but that appearance

(1) 72 J. P. 480. (2) [1909] 2 K. B. 614.

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by counsel or solicitor is sufficient. In my opinion, when a constable upon demand made by him is handed a licence by the driver of a car, that amounts to a statement by the driver that the licence is his and that the name and address mentioned in the licence are his name and address, and it is prima facie evidence at any rate that a person of that name and address was driving the car on that occasion. It is contended that the identity of the appellant with the driver who was stopped at Barnet and who produced the licence to the constable must first be proved before secondary evidence of the contents of the licence can be given. When it is borne in mind that the driver of a car is obliged to have his licence with him, it would be destroying the beneficial effect of this legislation if we were to accede to that argument. The name and address of the appellant are the same as those in the licence produced to the constable at Barnet, and the number of the appellant's licence is the same, and in my opinion that afforded some evidence of identity upon which the justices were entitled to act, more especially in a case like the present where the appellant appeared by counsel and abstained from coming to the Court, although he knew full well that the sole question before the Court was that of identity. Therefore with regard to the Barnet conviction I am of opinion that there was evidence of identity. I wish to add that, in order to avoid technicalities, it is advisable that notice to produce should be given, though the absence of a notice to produce was not the main point relied upon before us, the contention being that, even if a notice to produce had been given, evidence of the contents of the licence was not admissible until the identity of the two persons was first proved.

The other two convictions present more difficulty, because there was no evidence as to the contents of any licence produced to police constable Bristow when he stopped the cars on those two occasions at Crawley. Two convictions were put in evidence. The first was a conviction of a person named Lionel Walker Birch Martin, of Chelsea, London, and the second was a conviction of a person bearing the same four names, whose address was Ryder Street, St. James's, London. Dealing with the second of these two convictions, the question is whether in the circumstances it

affords in itself some evidence of identity of the appellant with the person who was so convicted. The combination of names is peculiar, and the names are the same as the appellant's names; the address is also the same as that of the appellant. Considering that the appellant appeared by counsel and deliberately absented himself from the Court and chose not to give evidence, though he knew that the question of identity was the only question before the justices, there was, in my opinion, evidence upon which the justices were entitled to come to the conclusion that the person convicted upon that occasion was the appellant. It is said, however, that by s. 18 of the Prevention of Crimes Act, 1871, under which these convictions were proved, there must be "proof of the identity of the person against whom the conviction is sought to be proved with the person appearing in the record or extract of conviction to have been convicted," and that there was no "proof" in this case. In my opinion "proof" does not mean conclusive proof. It means evidence upon which a jury may find that the identity is proved. No doubt in most criminal cases the prosecution calls a warder or a police officer who was present at the previous trial to prove that the prisoner is the same person, and for a good reason, because in many cases the prisoner was passing under a different name when he committed the previous offence, and therefore his identity has to be proved. But the cases of *Simpson* v. *Dismore* (1) and *Russell* v. *Smyth* (2) are authorities to shew that the Court may act upon identity of name and address as evidence of the identity of the individual. In my opinion the identity of the names and of the address was evidence that the appellant was the person who was convicted of the offence on January 5, 1908, and as, in order to support the order of the justices directing the indorsement of the licence, two previous convictions for exceeding the statutory speed limit are sufficient, it is not necessary to deal with the conviction for exceeding the speed limit on May 11, 1906. For these reasons I think that there was evidence upon which the justices were entitled to come to the conclusion that the appellant was previously convicted upon at least two occasions, and I may add that I also think that there was evidence upon which they might

(1) 9 M. & W. 47. (2) 9 M. & W. 810.

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come to the conclusion that the appellant was the person who was convicted of the offence on May 11, 1906.

The appeal must be dismissed.

BUCKNILL J. I agree with the judgment of my Lord, and have nothing to add.

BRAY J. As this is a case of some general importance, I wish to state in my own words my reasons for concurring in the judgment which we are now pronouncing.

The question before us is whether there was evidence upon which the justices were entitled to find that the defendant had been twice previously convicted. There were three previous convictions alleged against him for offences against s. 9 of the Motor Car Act, 1903. I will deal with the Barnet case first because, in my opinion, it is the strongest of the three. The evidence with reference to that conviction was first of all that given by the registration officer of the London County Council, who stated that a person having the same names and having the same address as the appellant had held a licence, bearing a particular number, to drive a motor car from February, 1904, continuously down to the present time, with the exception of a few days at the beginning of 1906, the licence being renewed annually, and that a licence bearing that number was issued to that person and to that person alone. The appellant was the holder of a licence bearing that number. That seems to me to trace the possession of a licence bearing that number to the appellant. That would not, however, afford evidence of the identity of the appellant with the person who was convicted at Barnet, and for that purpose Sergeant Baker stated in evidence that when he stopped the car at Barnet he asked the driver for his licence, and the licence was produced, which was in terms identical with the licence referred to by the registration officer of the London County Council.

The first objection taken to that evidence was that no notice to produce the licence had been served upon the appellant, and that therefore no secondary evidence of its contents could be given. That point came before this Court in *Marshall* v. *Ford*.(1)

(1) 72 J. P. 480.

I cannot say that I am free from doubt as to the decision in that case and as to the grounds upon which the decision was based. But, whether I differ from it or not, it was a decision upon the very point, and I am quite content to be bound by it. I think that the decision may be supported by the consideration that the licence is more than a mere document; it is an article, and there is no rule of evidence that notice to produce is necessary when the question is the identity of an article. Therefore it may be that notice to produce is not necessary when the document is something more than a document and is an article. Accordingly I take the evidence as admissible. It is then said that that evidence does not prove that the person who produced that licence at Barnet was the appellant. Now is the fact that that licence was in the possession of the driver of the car on that occasion evidence upon which the justices were entitled to come to the conclusion that that person was the appellant? Having regard to the nature of the licence and the reason why a motor car driver is required to take out a licence and to produce it when required, I think that it is some evidence. Sect. 3 of the Motor Car Act, 1903, requires that every person driving a motor car shall have a licence to drive granted by the county or borough council. It requires that person to carry his licence about with him when he is driving, because he must produce it when demanded by a police constable, and it is made an offence if he fails to produce it. The driver must produce, not somebody else's licence, but his own licence. Therefore it seems to me that the fact that the driver of the motor car who committed the offence of which he was convicted at Barnet produced this licence to Sergeant Baker upon that occasion is, when taken together with the evidence given by the registration officer of the London County Council, some evidence that he was the person who was mentioned in the licence and the person to whom that licence was issued, and therefore some evidence of his identity with the appellant. There is therefore some evidence of identity of the driver of that motor car with the appellant, upon which, in the particular circumstances of this case, the justices might act. The appellant, knowing full well that the question in dispute at the second hearing was whether

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he was the person who was convicted at Barnet, deliberately upon the advice of his counsel stayed away from the Court so as to make identification as difficult as possible. Bearing in mind that the appellant had simply to come forward and state that he was not the person who was convicted on that occasion, and that he abstained from doing so, I am of opinion that the justices were at liberty to act on very slight evidence, there being no evidence to the contrary. For these reasons I think that there was evidence of identification in the Barnet case.

I now come to the conviction marked C for an offence on January 5, 1908. That was a conviction of a person of the name of Lionel Walker Birch Martin, of Ryder Street, St. James's, London. I quite agree that there must be more than the mere production of a conviction; there must be evidence of identity; that is to say, there must be evidence of identity upon which a jury may properly act. But the copy of the conviction itself may afford evidence of identity. It is admitted that the appellant bears those four names and that he lives at Ryder Street, St. James's, and further that he holds a motor car driver's licence. It seems to me that that evidence, though it is somewhat slight, is, in the circumstances of the case, sufficient to entitle the justices to say that the identity of the person who was convicted of the offence near Crawley with the appellant is proved. With regard to the other conviction marked A, the name of the person convicted is the same, but the address is different. That would be a matter of some moment, but it is disposed of when once it is found that the appellant is the person who was convicted on the occasion of the later offence at Crawley, because it is stated in the case that the motor car which police constable Bristow stopped on the second occasion at Crawley was being driven by the same person who had been driving the car on the previous occasion.

The result is that there was evidence upon which the justices were entitled to arrive at the conclusion they did in regard to all three convictions.

Appeal dismissed.

Solicitors for appellant: *Kenneth Brown & Co.*

Solicitors for respondent: *Wontner & Sons.*

W. F. B.

[IN THE COURT OF APPEAL.]

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RADCLIFFE *v.* PACIFIC STEAM NAVIGATION COMPANY.

Employer and Workman—Compensation—Application to Review—Res judicata—Change of Circumstances—Workmen's Compensation Act, 1906 (6 *Edw.* 7, c. 58), *Sched. I.* (3.), (16.).

The amount which an injured workman "is earning or is able to earn in some suitable employment" at the date of an application to review a weekly payment under the Workmen's Compensation Act, 1906, cannot necessarily have been finally determined at any period of time, and cannot therefore be res judicata. The issue on such an application is the same as if it were an original award made at the date of the application to review.

Where subsequent experiment has shewn that the previous decision based on expert evidence was wrong, there is a change of circumstances which will justify an application to review the weekly payments.

Sharman v. *Holliday & Greenwood, Ld.*, [1904] 1 K. B. 235, applied.

APPEAL against an award of the judge of the county court of Liverpool upon an application to review an agreement for compensation under the Workmen's Compensation Act, 1906.

The question raised by this appeal was whether there could be a review of the weekly payments with no change in the physical condition of the injured workman since the last award or review, that question being in effect res judicata. The facts as stated by Cozens-Hardy M.R. in his judgment were as follows.

The applicant Radcliffe was employed as butcher's mate on one of the respondents' vessels. In 1907, he met with an accident by which he lost one of his fingers; the respondents admitted liability, and he was awarded 15*s.* a week during incapacity.

In May, 1909, the respondents applied for a review or termination of the weekly payments on the ground that the applicant was no longer incapacitated from following his employment by reason of the accident, and evidence was given to the effect that he was able to follow his old work for the respondents, which was the best proof of his ability. The applicant gave evidence that by reason of the loss of his finger he could not,

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after his employment with the respondents came to an end, procure other employment at the abattoir or at a private butcher's, owing to the injury to his hand.

In June, 1909, the county court judge decided that the applicant's chances of employment were somewhat impaired owing to the accident and reduced the weekly payment to 1*s.* per week. In October following the applicant applied to review this weekly payment. It was admitted that the applicant's physical condition was the same as in June, but he proposed to prove, and the Court held it must be taken that he could prove, that repeated applications in all likely quarters since June had established his inability to obtain employment, because doctors would not pass him as fit for service on board ship as a butcher.

The respondents contended that no such evidence could be admitted, as this matter was res judicata. The county court judge, however, accepted the evidence and increased the payments from 1*s.* to 15*s.* a week.

The respondents appealed.

C. A. Russell, K.C., and *Cuthbert Smith*, for the appellants. The applicant was dismissed for failing to join his ship in proper time; he was not dismissed owing to any incapacity for his work. The applicant's physical condition is precisely the same now as it was in May last, and there has been no change of circumstances which will justify the present application to review; the matter is in fact res judicata.

Crossfield & Sons, Ld. v. *Tanian* (1) shews that there cannot be a review of the compensation unless there is a change of circumstances. Fluctuations in the labour market are not to be taken into consideration and cannot affect the liability of the employer or make a change of circumstances.

Clark v. *Gas Light and Coke Co.* (2) and *Sharman* v. *Holliday & Greenwood, Ld.* (3) are essentially different from the present case. Here the applicant only seeks to add to the evidence he produced in May a further number of witnesses who will say exactly the same as the witnesses produced in May; this

(1) [1900] 2 Q. B. 629. (2) (1905) 21 Times L. R. 184.
(3) [1904] 1 K. B. 235.

is not fresh evidence. The issue in May was a simple issue of fact, did incapacity exist? The issue is the same now. If there had been a change of circumstances the case would be different and the amount proper to be awarded would not then be res judicata. In the present case the evidence tendered was not admissible and the county court judge was wrong in accepting it. The mere fact that subsequent experiment has shewn that the previous decision was wrong is not a sufficient change of circumstances to justify a review.

Horridge, K.C., and *Rigby Swift*, for the applicant. The county court judge was entitled to go into the question whether the applicant's chance of work had been lessened by the state of his hand; the present case is within *Clark* v. *Gas Light and Coke Co.* (1)

A workman is entitled to have a review of the weekly payments at any time; the doctrine of res judicata does not apply to a decision as to the amount which an injured man is earning or able to earn at the date of the review. The applicant now proposes to shew that the previous decision in May, based on expert evidence, was wrong; that he is entitled to do this is clear from *Sharman* v. *Holliday & Greenwood, Ld.* (2) and *Mead* v. *Lockhart.* (3) The same point was raised in this Court in *Rothwell* v. *Davies* (4) on March 25, 1909.

C. A. Russell, K.C., in reply. *Clark* v. *Gas Light and Coke Co.* (1) is quite different from the present case; there the issue on the first hearing was whether the applicant's inability to work was the result of the accident or of his own misconduct. There is no change in the applicant's physical condition, nor in the opportunity for work; there is nothing which should induce the Court now to vary the payments, when the circumstances are just the same as they were in May.

Cur. adv. vult.

Feb. 24. COZENS-HARDY M.R., after stating the facts as above, continued:—The material statutory provisions are clause 3

(1) 21 Times L. R. 184.
(2) [1904] 1 K. B. 235.
(3) Butterworth's Compensation Cases, vol. 2, 398.
(4) Unreported.

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of the First Schedule and clause 16 of the same schedule. It must never be forgotten that a review under clause 16 is not an appeal, nor is it a rehearing. It implies the introduction of new elements, or, as has been often said, a change of circumstances. It is not at first obvious that the doctrine of res judicata can in any way apply to an award which is expressly made liable to review. But it has been held, and I think rightly held, that an award stating that a man's wages at the date of the accident were x shillings cannot be reviewed on such a point: *Crossfield & Sons, Ld.* v. *Tanian.* (1) That is a positive fact, not admitting of a change of circumstances, and not a matter of opinion. The same consideration would prevent the reopening of an award finding that A. B. is or is not a dependant. On the other hand, it has been held that an award based upon medical opinion of a man's physical condition at one time in no way prevents a different award at a subsequent date when experience may have proved that the views of the doctors were wrong: *Sharman* v. *Holliday & Greenwood, Ld.* (2) In the language of Lord Collins (3), "I think there is a change of circumstances where subsequent experiment has shewn that the previous opinion based on expert evidence was wrong."

The present case, though distinguishable from *Sharman* v. *Holliday & Greenwood, Ld.* (2), ought, I think, to be governed by the principle there laid down. True, it is not a question of the inaccuracy of expert medical evidence; nor, on the other hand, is it a question of a positive fact. In June the county court judge came to the conclusion (1.) that the man was able to do his work, and (2.) that his chances of obtaining employment were not very materially reduced. This latter conclusion was obviously a matter not of fact, but rather of opinion. The subsequent experience may well have established the inaccuracy of this opinion, and this is a change of circumstances which justifies a review.

Although I think it is competent to the county court judge to review an award similar to that which was made in June, it is right to add that any such application should be

(1) [1900] 2 Q. B. 629. (2) [1904] 1 K. B. 235.
(3) [1904] 1 K. B. at p. 240.

jealously scrutinized, and, further, that great care must be taken not to allow the fluctuations of the general labour market to justify a review. But a workman is entitled to say that although the physical effects of an accident may have disappeared or may be unaltered, yet he, as a damaged man, may be more and more handicapped in the labour market as years pass by. The unwillingness of masters to employ men suffering from any infirmity has been greatly increased by the Workmen's Compensation Act, and this is a circumstance which cannot be disregarded. The appeal must be dismissed with costs.

FLETCHER MOULTON L.J. This is an appeal from a decision of the county court judge reviewing an award dated June 24, 1909, under which the applicant was entitled to receive a weekly sum of 1*s*. This latter award was itself made on an application to review an earlier award dated March 18, 1908, made by consent, under which the applicant was entitled to receive a weekly sum of 15*s*.

The facts of the case are very simple. The applicant was a ship's butcher, and when in the service of the respondents he ran a fish bone into his finger, the top joint of which had to be amputated. The respondents admitted that the accident arose out of and in the course of his employment by them, and on March 18, 1908, consented to an award of 15*s*. per week during incapacity. But as they took him back immediately into his old place at the old wages, nothing was paid under that award until he ceased to be employed by them on December 13, 1908. The evidence is somewhat conflicting as to whether he had misbehaved himself prior to that discharge, but as the respondents were under no obligation to employ him and ceased to do so in the exercise of their ordinary rights as employers, the matter seems to me to have no bearing on the question before us. He continued to receive 15*s*. per week until in May, 1909, the respondents applied to reduce the weekly payment of 15*s*. on the ground that he was then able to earn ordinary wages. On the evidence then adduced before him the county court judge decided that he was capable of earning his ordinary wages, but that his chances of employment were somewhat reduced by the mutilation,

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and consequently reduced the award to 1*s.* per week. On October 20, 1909, the workman applied for a review of this last award, and proposed to prove by evidence that he was unable to get work and that repeated efforts on his part to obtain employment as a butcher had entirely failed. Counsel for the respondents raised a preliminary objection that the matter was res judicata, and that, inasmuch as the applicant was not prepared to shew that the mutilation had in any way changed, and that on the last occasion the Court had measured his incapacity as arising therefrom at 1*s.* per week, the matter could not be reopened. The learned judge decided that the matter was not res judicata and that he had jurisdiction to entertain the application, whereupon counsel agreed to the restitution of the compensation to the original figure of 15*s.* per week subject to the results of an appeal on this point.

In my opinion the decision of the county court judge was right. The doctrine of res judicata does not apply to a decision as to the amount of weekly payment to the injured workman when it is made the subject of an application to review, although it may apply to some of the facts proper to be considered on the occasion of such a review. The issue on such a review is the same issue as if it were an original award made at the date of the review, and the amount to be awarded is a payment which in case of partial incapacity must not exceed the difference between the amount of the average weekly earnings of a workman before the accident and the average weekly amount which he is earning, or able to earn, in some suitable employment or business at the date of the review, but is to bear such relation to the amount of such difference as may under the circumstances of the case appear proper. Now the average weekly earnings of the workman before the accident is a question of fact relating to a past date, and, therefore, if it has been litigated between the parties on any previous occasion (as, for instance, on the occasion of the original award) it may fairly be looked upon as res judicata and be treated as a matter that cannot be reopened. But the amount of wages which he is earning or able to earn in some suitable employment or business at the date of the review is ex necessitate rei a matter which has not been and could not have been litigated

between the parties prior to the date of the review, and therefore cannot come under the head of res judicata. It is evident, therefore, that the amount to be awarded on review is not and cannot be res judicata since one of the necessary elements that must go to decide it is not res judicata. This difficulty was felt by counsel for the appellants, who were forced to admit that if the circumstances had changed they could not contend that the amount proper to be awarded was res judicata. To my mind that amounts to giving up the contention. The proposition that it is open to the applicant to have a review if he puts forward evidence of a particular kind, but that the matter is res judicata if he does not, is unintelligible to me. Whether or not the matter is res judicata must depend solely upon whether the issue to be decided by the county court judge has already been litigated and decided between the parties. If the decision on the previous occasion is to be held to constitute a decision binding for all time, although one of the elements going to that decision is the amount of wages that the applicant is earning, or able to earn, at the moment of the inquiry, then no change in the amount of such wages can get rid of the plea of res judicata and review would be impossible. If on the other hand it is not binding for all time, there can be no question of res judicata, and on the occasion of a review the county court judge is bound to consider what should be the amount of the weekly payment upon the facts relating to the then state of things.

It is everyday practice that employers apply for and obtain a reduction of the weekly payment by shewing that since the date of the award or of the last review the workman has obtained suitable employment or has been offered it and refused. This would be impossible if the doctrine of res judicata applied.

Apart from these grounds I am of opinion that the particular question raised in this appeal is fully covered by the decision of the Court of Appeal in *Sharman* v. *Holliday & Greenwood, Ld.* (1) It was held in that case that a decision as to the condition of the workman and the nature of his injuries did not constitute res judicata, because it was merely the expression of opinion based on the evidence then procurable, and that it might be

(1) [1904] 1 K. B. 235.

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corrected at a future time when experience and future developments had increased the materials for arriving at a correct conclusion. The present case is to my mind an a fortiori case. Where there is a mutilation which, while not depriving the workman of the power to do his ordinary work, places him at a disadvantage in the way of obtaining employment, it is not merely a matter of opinion what is the pecuniary equivalent of that disadvantage, but it is really a matter of a most speculative type of opinion. Further experience such as that which was proposed to be given in evidence in the present case may to a most material extent modify a previous opinion either in the direction of the effect being greater or less than was anticipated. If the workman has repeatedly tried to obtain employment and has failed on account of his mutilation, the county court judge will rightly attach importance to that fact in coming to the conclusion that the workman is at a serious disadvantage. If on the other hand the employers can shew that the prejudice against the workman has in fact not prevented his getting employment readily, he will rightly be influenced in the other direction. To my mind one of the main grounds for which the power of review has been given is that evidence of this kind should be brought before the tribunal so as to correct the necessarily speculative conclusions that the Court is forced to draw as to the effect of a personal injury on the future earning power of the injured workman.

I am therefore of opinion that this appeal should be dismissed with costs.

BUCKLEY L.J. Upon this appeal the only question before the Court is whether the learned judge's decision of June 24, 1909, was res judicata so as to preclude him from reviewing the agreement on November 18, 1909. The order of June 24, 1909, was one which fixed the applicant's compensation at 1*s.* a week. Compensation is under Sched. I. (3.) to be fixed by ascertaining the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning, or is able to earn, after the accident. By clause (16.) the weekly payment thus fixed may be reviewed at

the request either of the employer or of the workman. The workman applied on October 20, 1909, for its review. Upon such an application certain matters may be, I think, res judicata. For instance the question whether the man was a workman under the Act at all; whether an accident had occurred to him arising out of and in the course of his employment; what were his average weekly earnings before the accident. These are all questions of fact which, for the purpose of the first determination by the tribunal, would have to be found as facts and whose decision would as between the parties be res judicata. But the question what is the average weekly amount which he is earning or is able to earn after the accident is a matter which cannot necessarily or perhaps in any case be finally determined at any point of time. The words "which he is earning" can, I think, be satisfied only by finding what he is earning at the date of the review. The words "which he is able to earn after the accident" may in many cases be capable of being answered at any particular moment only by way of estimate or prophecy. If circumstances subsequently occur to shew that the estimate or prophecy was erroneous, either employer or workman is, I think, by virtue of the statute entitled to apply for a review and to shew what are the circumstances which ought to lead the Court to the conclusion that the amount theretofore fixed as the average weekly amount which he is earning or is able to earn is not correct. The decision in *Crossfield & Sons, Ld.* v. *Tanian* (1) is an authority for the proposition that a finding as to such facts as first suggested may be res judicata. The employer there sought to make out that the average weekly earnings before the accident had been erroneously determined upon the first adjudication. This was an adjudication upon a state of things in the past and, whether right or wrong, was binding between the parties. *Clark* v. *Gas Light and Coke Co.* (2) and *Sharman* v. *Holliday & Greenwood, Ld.* (3) are instances of the second class of question of fact. The question there in dispute was whether the average weekly amount which the man was able to earn after the accident had or had not been rightly fixed. In the former class of case the

(1) [1900] 2 Q. B. 629. (2) 21 Times L. R. 184.
(3) [1904] 1 K. B. 235.

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decision was res judicata. In the second class of case it was not. The case now before the Court is one of the second class. The workman contended that his incapacity for the future by reason of the accident had been placed too low when it was fixed at 1*s.* a week. The contention was based not upon any alteration in the labour market (for fluctuations in the market ought not to be taken into consideration), but upon facts which he wished to adduce to shew that circumstances since June, 1909, had put him in a position to prove that his incapacity arising from his mutilation had been estimated in June at too low a sum. It seems to me that by the language of Sched. I. (16.) of the statute this matter is made subject to review and that finality is reached only when, as in *Nicholson* v. *Piper* (1), an award has been made that the weekly payments cease altogether on the ground that incapacity has ceased. For these reasons I think that the learned county court judge was right and that this appeal ought to be dismissed.

Appeal dismissed.

Solicitors: *Botterell & Roche, for Weightman, Pedder & Co., Liverpool; Rawle, Johnstone & Co., for Bremner, Sons, & Corlett, Liverpool.*

(1) [1907] A. C. 215.

W. C. D.

[IN THE COURT OF APPEAL.]

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1910
Feb. 17.

EYRE *v.* HOUGHTON MAIN COLLIERY COMPANY, LIMITED.

Employer and Workman—Compensation—"Suitable Employment"—Workmen's Compensation Act, 1906 (6 *Edw.* 7, c. 58), *Sched. I., par.* 3.

The applicant, a collier, whilst getting coal at the coal face in the respondents' colliery, met with an accident owing to a piece of coal flying from the face into his left eye, which was thereby rendered practically useless. The respondents, having paid him compensation for several months, offered him work at the coal face at his old wages, and, on his refusal to accept this work, ceased making any further payments on the ground that the work offered was suitable employment within the meaning of the Workmen's Compensation Act, 1906, so as to relieve them from further liability. The county court judge was satisfied on the medical evidence that there was some appreciable increase of risk of injury to the remaining eye, and of injury generally, in working at the coal face with only one available eye instead of two, and was of opinion that this was not quite suitable employment. He therefore made an award in favour of the applicant:—

Held, that the finding of the county court judge meant that the work was not suitable employment, though it came near to suitability, and that, there being evidence to support that finding, it could not be disturbed.

Appeal from an award of the judge of the Barnsley County Court sitting as arbitrator under the Workmen's Compensation Act, 1908.

On December 3, 1908, the applicant, a coal miner, met with an accident whilst working in the respondents' colliery. He was getting coal at the coal face and a piece of coal flew from the face into his left eye and injured it. The injury was such as to destroy for working purposes the useful sight of the injured eye, though not to destroy all power of vision in that eye. The result of the accident was that the injured eye deceived him when looking at a particular object. He saw a multiplicity of objects more or less in a mist, and instead of being aided by this eye in work he was rather impeded by it, and the judge found that no improvement in his eyesight was probable. The respondents paid him 1*l.* a week compensation until July 17, 1909,

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when they offered him work at the coal face at his old wages. This he refused, and he wanted the respondents to give him work on the surface and to supplement his wages by paying compensation under the Act. The respondents declined to take him back unless he would work at the coal face and they ceased to pay him compensation. The applicant then filed a request for arbitration. The question between the parties was whether in the above circumstances the work offered by the respondents was suitable employment within the meaning of par. 3 of the First Schedule to the Act so as to exempt the respondents from liability to pay any further compensation.

The county court judge was satisfied by the medical evidence that there was some appreciable increase of peril of injury to the remaining eye, and of injury generally, in working at the face with only one available eye instead of two, and was of opinion that the work offered was not quite suitable employment for the applicant. His reasons for this opinion were not that the man could not physically do the work, but that he ran an appreciable increased risk to his remaining eye from being rendered by the accident less quick to see and avoid coal flying from the face and other risks incident to coal mining and machinery, and that an injury to the remaining eye of a serious nature might result in total blindness and absolute incapacity to support his family or himself. He therefore made an award in favour of the applicant.

The respondents, the employers, appealed.

C. A. Russell, K.C., and *H. R. Bramley*, for the employers. The question is, what is the meaning of "suitable employment" in par. 3 of the First Schedule? (1) The judge has misdirected

(1) Sched. I., par. 3: "In fixing the amount of the weekly payment, regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity, and in case of partial incapacity, the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident, but shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper."

himself in saying that the employment is not quite suitable. The Act says "suitable." It does not say that, if there are half a dozen different employments which may be arranged in their order of suitability, and what the man is offered is the sixth of those, it is not suitable because the other five are more suitable. The word "suitable" does not depend on the question whether the man is acting reasonably in refusing to accept the employment, but it must be interpreted with reference to the capacity of the man and the nature of the work. The fact that the man was not quite so well fitted for the work after the injury as he was before does not prevent the employment from being suitable, and it was this consideration that induced the judge to insert the word "quite"; it is not suggested that the man is not perfectly well able to do the work. Then the learned judge gives as his reason for saying that this work is unsuitable that there is an appreciable increase of risk to his remaining eye, but par. 3 assumes that the man is partially incapacitated, and this reasoning would apply to almost any occupation and is not relevant to the question of suitability. The question under the Act is, what is suitable employment for a man who is ex hypothesi partially incapacitated from work? You cannot render employment unsuitable by merely pointing out that, the man not being as good a man as he was before the accident, a further accident would have a more serious effect upon him, or that there would be a greater risk of a further accident occurring to him.

Simon, *K.C.*, and *Waddy*, for the applicant, were not called upon to argue.

COZENS-HARDY M.R. This is an appeal from an award of the judge of the Barnsley County Court, and the only question raised by the appeal is as to the meaning of par. 3 of the First Schedule to the Act. The arbitrator is to have regard to the weekly amount the injured man is able to earn in some suitable employment after the accident. What is the meaning of "suitable employment"? It seems to me that it is a question of fact in each case for the learned judge, having regard not merely to the physical condition of the man but also to the nature and

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character of his occupation before the accident and the nature of the work which is offered after the accident.

The facts are very simple. The man was a miner, and after having been working on the coal face he met with an accident which immediately arose out of and in the course of his employment. His left eye was injured. The effect of the accident was that not only was the eye not available as a good eye, but apparently it was in some respects worse than no eye. For the learned judge finds as a fact that the injured eye "deceives him when looking at an object such as a candle. He sees a multiplicity of candles, more or less in a mist, and instead of being aided by this eye in work he is rather impeded by it, so much so that it would seem his best plan, if he did work at the face, would be to work with a patch over the injured eye, and rely solely on the sound one remaining." He must be treated, therefore, for the present purpose as a man with only one eye. The learned county court judge also finds as a fact that the injury the man has sustained to his left eye so far as one can gather will be permanent. The employers have offered to take him back to his old work as a collier working on the face, but the man says "No, I will not go back; it is not a suitable employment for this reason, that working on the face is work which specially entails the danger of injury to the eyes of the miner. A man with only one eye is still more liable to those accidents than a man with two eyes; he cannot as well judge distances, and take precautions, as a man who has two eyes; and, further, the consequences of an accident to a one-eyed man are far more serious than they would be to a man with two eyes. This, therefore, is an employment which is not suitable for me, not in the sense that I cannot wield a pickaxe and do physically the work of a collier on the face, but in the sense that it is an employment involving a special kind of danger to the eye and a special kind of danger which is greater to a one-eyed man than to a man with two eyes." The learned judge having, in substance, that evidence before him says that he does not think this is quite suitable employment. Counsel for the appellants say that that means something different from a finding that it is not a suitable employment. I do not so read his judgment. It means that it is not a suitable employment,

although it is not very far off being a suitable employment, but it negatives the idea that it is a suitable employment, and if there is any evidence to justify that as a finding of fact we cannot interfere with it. It seems to me there was ample evidence. The learned judge says: "The medical evidence, taken as a whole, satisfies me that there is some appreciable increase of peril of injury to the remaining eye, and of injury generally in working at the face with only one available eye instead of two; and that Eyre would also, in consequence of the accident, for a considerable time, though possibly not always, either earn slightly less money than in his uninjured state, or have to work slightly harder to make the same money." In so far as it is merely a matter of getting less money, that is a matter which would only involve some extra payment under the Workmen's Compensation Act. Then he goes on to say this: "I am of opinion, as I have already said, that it is not quite suitable employment for him. My reasons for this opinion are, not that he cannot physically do the work, for I think he can, though, as I have said, in effect, at a slight disadvantage, but that he runs an increased appreciable risk to his remaining eye from being now rendered by the accident less quick to see and avoid coal flying from the face and the other risks incident to coal mining and machinery, and that if he should sustain an injury to the remaining eye of a serious nature the result may well be total blindness and absolute incapacity to support his family or himself"; and he adds, "It is impossible to regard accidents to the eye as a negligible risk in coal mining at the face. Large numbers of accidents to eyes occur in all collieries, many of them, doubtless, slight in their nature, but some substantial number occur every year at the coal face in this district which are of a serious character." It is not necessary, and it would not be right, for me to say whether on that evidence I should have found as the learned judge did. It is impossible, in my opinion, for us to say that there was not evidence which justified the learned county court judge in finding as he did that this was not a suitable employment within the meaning of the Act. Therefore I think that this appeal fails and must be dismissed with costs.

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FLETCHER MOULTON L.J. I am of the same opinion. The question whether this was a suitable occupation is a question of fact, and I agree with the Master of the Rolls in holding that when the county court judge finds that this is not quite a suitable employment he means that it is not a suitable employment, though it is nearly so. Has he misdirected himself in coming to the conclusion that it is not a suitable employment? He says, and I quite agree with him, "I think the word 'suitable' is used in the Act to allow the arbitrator to consider all the circumstances of the particular man and case in deciding what is or what is not a suitable employment." In considering the circumstances of the man and of the case he says that his reasons for thinking it not suitable do not relate to the physical power of the man to do the work, but to the fact that the risk to the remaining eye is greater than before the accident and the consequences are more serious. In my opinion both those are circumstances which may rightly influence him. The mere fact that the risk would be greater does not necessarily carry with it that the employment is unsuitable, because the risk might be small, or it might be so very slightly increased that it would still be such an ordinary risk as persons who are earning their living in such an employment as this ought to be ready to run. But it is most certainly an element that has to be considered. Similarly the fact that the consequences of the risk, which is a special one in the case of mining, that is to say, injury to the other eye, would be so much more serious after this past accident is also a consideration which the county court judge is justified in having regard to. Let me give an example. Suppose it was a question of exposure, and the exposure was such as a healthy man might bear, but by reason of the accident a man had developed a delicacy of the lungs; he would have a perfect right to say "The risk of exposure is one which a healthy man might bear because it would only be a question of a cold, or at the worst a slight bronchial attack in his case, but in my case it would probably be death, and therefore I decline to take that employment because in my condition it is not suitable."

I think I ought to add that in my opinion you cannot consider

an employment suitable that a reasonably careful man desirous of earning his living is entitled to reject because it exposes him to risks so serious in their consequences that he feels he is not doing his duty to himself and his family in encountering them. That appears to me to be the view that the judge took in this case. It was for him to decide it and not for us, and I am satisfied that in deciding it as he has done he has taken into account the considerations which he was justly entitled to do.

BUCKLEY L.J. I do not agree that the question we have to decide is accurately described as a question of fact. I think it is a mixed question of fact and law. The first question is, Under the Act of Parliament what is the true construction of the words "suitable employment"? I think that those words are to be read in a broad sense. You have to ascertain what employment is suitable as distinguished from unsuitable. You cannot say that employment A is unsuitable because employment B is more suitable than A. There are no degrees of suitability. You have to reach the point at which the occupation becomes unsuitable before you are outside the Act of Parliament, and you are bound to take into consideration the broad circumstances of the particular case. That being so, for my own part, if it had been my duty to decide this case in the county court, I should have decided it the other way, but it does not follow that I ought, therefore, to reverse the judgment of the learned judge. I have to see, first, whether he has misdirected himself as to the law, and, secondly, whether he has determined the question of fact on proper evidence. If he has so determined it it is not for me to review his finding. I cannot find that he has misdirected himself. He has expressed the opinion that this employment is not quite suitable. It is not a courageous conclusion, but it must, I think, mean that this employment although it approaches near to yet does not reach suitability. That is negativing suitability. Well, then, has he assigned grounds as matter of fact which he is entitled on the evidence to assign for coming to that conclusion? I do not myself accept that it would be a good reason to assign that having lost one eye the loss of the second would be of greater import to the man in

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question than to any other man. Of course it would be, but I do not think that that is relevant upon the question of suitability. What he found and what I think binds me is this: he finds that the man "runs an increased appreciable risk," as he says, "to his remaining eye." If you substitute "to his eyesight" I agree with the learned judge. "He runs an increased appreciable risk to his eyesight from being now rendered by the accident less quick to see and avoid coal flying from the face and the other risks incident to coal mining and machinery." He seems to have found that this is a man who in this occupation suffers from a particular disability liable to lead him into danger, and that he ought not to be exposed to that danger. I do not think I can review that finding. That is a question of fact, and on that question of fact, although I myself should have arrived at another conclusion, I think that it is the county court judge and not I who is the judge to decide.

Appeal dismissed.

Solicitors for appellants: *Bell, Brodrick & Gray, for Parker Rhodes & Co., Rotherham.*

Solicitors for respondent: *Corbin, Greener & Cook, for Raley & Sons, Barnsley.*

H. B. H.

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Revenue—Will—Legacy—Payable out of Realty—Application of Income to Maintenance of Legatee—Uncontrolled Discretion of Trustees—Succession Duty—Legacy Duty Act, 1796 (36 *Geo.* 3, *c.* 52), *s.* 11—*Stamp Act*, 1815 (55 *Geo.* 3, *c.* 184), *Sched., Part III., r.* 2—*Revenue Act*, 1845 (8 *& 9 Vict. c.* 76), *s.* 4—*Customs and Inland Revenue Act*, 1888 (51 *Vict. c.* 8), *s.* 21, *sub-s.* 2.

A testator devised real estate to trustees upon trust in a certain event (which happened) to apply the whole or so much of the net income as the trustees in their absolute and uncontrolled discretion might deem right for the maintenance of A. The trustees in the exercise of their discretion applied a portion of the income to A.'s maintenance and intended to continue so applying it from time to time:—

Held, that each such application, as and when the income was so applied, became and would become a legacy to A. in respect of which succession duty was and would be payable.

Information by the Attorney-General.

Peter Latham, of Southport, in the county of Lancaster, by his will appointed the defendants and his nephew Thomas William Latham executors thereof and appointed the defendants trustees thereof, and he appointed them to be trustees for all the purposes of the Settled Land Acts, 1882 to 1890, and also for the purposes of s. 42 of the Conveyancing and Law of Property Act, 1881. The testator thereby devised his estate known as the White Rushes to the defendants during the life of Eva Latham upon trust that they should, so long as they should be of opinion that the said Eva Latham was competent to have the control and management of the White Rushes estate, permit her to receive the income thereof and be in the position of a tenant for life thereof, and when in their absolute, uncontrolled, and unrestricted judgment she should become incompetent to have the control and management thereof, in such case as well as on her death the aforesaid trust in favour of Eva Latham should cease, "and after the cesser of the said trust in the lifetime of the said Eva Latham upon trust that the trustees should enter into and during the residue of her life continue in possession or receipt of the rents and profits of the White Rushes estate and might exercise with respect thereto all the powers of management and other

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powers mentioned in s. 42 sub-s. 2 of the Conveyancing and Law of Property Act 1881 and also all the powers conferred on a tenant for life by the Settled Land Acts 1882 to 1890 and should apply the whole or so much of the net income of the said hereditaments (after payment of all rates taxes and other outgoings and expenses incurred in the exercise of the aforesaid powers and in the opinion of the trustees properly payable out of income) as the trustees in their absolute and uncontrolled discretion without being liable to account for the exercise of such discretion might deem right to or for the maintenance and support or otherwise for the benefit of the said Eva Latham." And the testator directed the trustees to pay so much of the said net income as should not be applied by them under the discretionary trust thereinbefore contained for the maintenance and support or otherwise for the benefit of the said Eva Latham to the persons who under the limitations thereinafter contained would be entitled to receive the same if Eva Latham were dead. The will then directed that after the death of Eva Latham the estate should remain to such uses in favour of the issue of Eva Latham as were therein mentioned, with remainder to the use of Thomas William Latham, with remainders over; and the testator devised and bequeathed all his real estate not thereinbefore devised and the residue of his personal estate to the said trustees upon trust for sale and for investment of the moneys to be produced by such sale and of all other moneys forming part of his residuary estate, and to stand possessed of the investments and of the annual income thereof upon the like trusts and subject to the like powers and provisions as if the same were investments of capital money arising under the Settled Land Acts, 1882 to 1890, from the White Rushes estate thereinbefore devised in settlement and so as to be primarily liable to be invested in the purchase of land for an estate in fee simple to be conveyed to the uses thereinbefore declared concerning the White Rushes estate thereinbefore devised in settlement.

The testator died on September 17, 1906, and the will was on November 2, 1906, duly proved by the defendants and the said Thomas William Latham in the principal registry of the Probate Division.

The said Eva Latham, who had attained the age of twenty-one years but had never been married, was a stranger in blood to the testator.

On February 4, 1907, the defendants as trustees of the testator's said will signed a certificate that on that day they had met and concurred in the judgment that the said Eva Latham was incompetent to have the control and management of the White Rushes estate, she having been put under restraint by the testator in his lifetime, and being at the date of his death and on the said February 4, 1907, under restraint in St. Andrew's Hospital for Mental Diseases at Northampton.

The executors of the testator's said will assented to the devise to the defendants of the said White Rushes estate and to the devise and bequest to them of the testator's residuary estate.

The defendants sold the White Rushes estate for a sum of 4500*l.* and invested that sum in their names.

In January, 1908, the said Eva Latham was discharged from restraint.

The defendants admitted that a portion of the income derived from the investment of the proceeds of sale of the White Rushes estate and the testator's residuary estate had been applied for the maintenance and support or otherwise for the benefit of the said Eva Latham. What portion of such income would be similarly applied during the residue of her life they were unable to say beyond this—that they intended to exercise honestly from time to time the discretion in that behalf given to them by the will of the testator.

The Attorney-General prayed a declaration that succession duty and legacy duty at 10 per cent. had and would become payable as on the death of the said Peter Latham, as to succession duty upon all such moneys being income derived from the White Rushes estate or the testator's residuary real estate or the proceeds thereof respectively, and as to legacy duty upon all such moneys being income derived from the testator's residuary personal estate as had been or might thereafter be applied to or for the maintenance and support or otherwise for the benefit of Eva Latham.

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The defendants were willing to pay legacy and succession duty at the rate claimed in respect of the income of the testator's estate belonging to Eva Latham between September 17, 1906, the date of the testator's death, and February 4, 1907, but they denied that such duties were or would become payable in respect of any moneys, being income of the investments representing the proceeds of the sale of the White Rushes Estate and the testator's residuary estate, which had since February 4, 1907, been or might thereafter be applied for the maintenance or otherwise for the benefit of Eva Latham.

Sir Samuel Evans, *S.-G.*, and *Austen-Cartmell*, for the Crown. The gift of moneys out of the income of the testator's real estate for the maintenance of Eva Latham subsequently to the cesser of her life estate in February, 1907, was a legacy, and previously to 1888 would have been chargeable with legacy duty. The definition of the term "legacy" in s. 4 of the Revenue Act, 1845 (8 & 9 Vict. c. 76), is amply wide enough to cover it. By that section "Every gift by any will . . . . of any person which . . . . is or shall be payable or shall have effect or be satisfied out of or is or shall be charged or rendered a burden upon the real . . . . estate of such person or any real or heritable estate or the rents or profits thereof which such person hath had or shall have had any right or power to charge burden or affect with the payment of money . . . . whether such gift shall be by way of annuity or in any other form . . . . shall be deemed a legacy within the true intent and meaning of all the several Acts granting or relating to duties on legacies." The gift of maintenance here was payable or to have effect out of real estate. Moreover, it comes within the terms of the Stamp Act, 1815 (55 Geo. 3, c. 184), Sched., Part III., r. 2, which provides the scale of duties therein specified for, amongst other gifts, "Every legacy, specific or pecuniary, or of any other description, of the amount or value of 20*l.* or upwards given by any will . . . . of any person . . . . out of or charged upon his or her real . . . . estate . . . . and which shall be paid." The case of *In re De Hoghton* (1) is a clear authority

(1) [1896] 1 Ch. 855.

that the benefit to Eva Latham is a legacy within the meaning of the taxing Acts. There a testator who died before 1888 devised real estate to trustees to pay an annuity to A. and subject thereto to accumulate the rents for a term of twenty-one years. It was held that as A. had during the term only a charge on the estate of another he must pay legacy duty on the annuity and not succession duty. So here after the cesser of Eva Latham's life estate her maintenance became payable out of the estate of another. In any case the gift comes within the terms of the later clause in the schedule to the Act of 1815, "And all gifts of annuities or by way of annuity or of any other partial benefit or interest out of any such estate or effects as aforesaid shall be deemed legacies within the intent and meaning of this schedule." Then if the gift of maintenance was a legacy, succession duty is payable in respect of it, in so far as it is paid out of the proceeds of real estate, by virtue of s. 21 of the Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), which provides that the duties under the Legacy Duty Acts shall no longer be levied in the case of legacies payable out of or charged upon the real estate of any person dying after July 1, 1888, but that in lieu thereof the duties under the Succession Duty Act, 1853, as amended by that Act "shall be levied and paid in respect of every such legacy (whether given by way of annuity or in any other form) as a succession to personal property." The fact that the trustees here have an absolute discretion whether they will apply any portion of the fund to the lady's maintenance is immaterial except to this extent, that until the trustees have exercised their discretion in her favour there is no benefit to her to which the duty can attach. But as soon and as often as they apply portions of the fund to her maintenance there is a legacy in respect of which the duty becomes payable. The case falls exactly within s. 11 of the Legacy Duty Act, 1796, which enacts that "If any benefit shall be given by any will or testamentary instrument in such terms that the amount or value of such benefit can only be ascertained from time to time by the actual application for that purpose of the fund allotted for such purpose or made chargeable therewith; or if the amount or value of any benefit given by any will or

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testamentary instrument cannot by reason of the form and manner of the gift be so ascertained that the duty can be charged thereon under any other of the directions herein contained, then and in every such case such duty shall be charged upon the several sums of money or effects which shall be applied from time to time for the purposes directed by such will or testamentary instrument as separate and distinct legacies or bequests and shall be paid out of the fund applicable for such purposes or charged with answering the same."

Danckwerts, K.C., and *Sargant*, for the defendants. This gift for maintenance in so far as it is charged upon land is not a legacy. It does not come within the definition of a legacy in s. 4 of the Act of 1845, for that section only brings a gift within the operation of the Acts imposing legacy duty where it is given as personalty. Although a gift be charged upon land, if it be given as personalty no doubt duty is payable, but where it is given as realty it is otherwise, and that is the case here. The defendants are authorized at their discretion to apply, not a specific sum out of the income of the real estate to the maintenance of Eva Latham, but the whole of that income or such indefinite amount as they may think fit. A trust to apply the whole of the rents and profits is not a charge upon the rents and profits, but a gift of the rents and profits themselves. Then if it is not a legacy the provisions of s. 21 of the Customs and Inland Revenue Act, 1888, have no application, and if any duty is to be charged at all it must be under the Succession Duty Act, 1853 (16 & 17 Vict. c. 51). But the case does not fall with that Act, for there was no "succession" within the definition of that term in s. 2. To bring a disposition of property within that section it must be one "by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person." Eva Latham did not become beneficially entitled to anything. Even if the gift were liable to duty in other respects, the fact of the trustees having an absolute discretion makes the value so indefinite as to be incapable of assessment. Where the discretion of trustees is directed by the will to be uncontrolled the Court will not interfere with their exercise of it:

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Gisborne v. *Gisborne* (1); and it is open to the defendants here, if they think proper, to give the lady nothing at all.

Sir Samuel Evans, S.-G., in reply. There was here no gift of the realty at all. But even if it did amount to a gift of real estate, that would not affect the liability to duty. For it comes within the very words of the schedule to the Act of 1815 as a gift of a "partial benefit or interest out of such estate or effects as aforesaid." In *Attorney-General* v. *Jackson* (2), where a testator gave an annuity or rent-charge of 500*l.* payable out of certain freehold property to one Joseph Troughton "with such powers and remedies of distress and entry and perception of rents in case the said annuity of 500*l.* should be in arrear as are reserved to lessors for the recovery of rents on leases for years," and subject to that annuity gave the property in equal moieties to the defendants, it was contended that the gift of the annuity was in fact real property. But the Court held that it was a gift by way of annuity "out of or charged upon" the testator's real estate and therefore liable to legacy duty within the express language of the schedule.

BRAY J. In this case the Attorney-General asks for a declaration that succession duty and legacy duty at 10 per cent. have or will become payable upon certain moneys or benefits which Eva Latham has received or will receive under the will of Peter Latham. By that will the testator first of all dealt with the White Rushes estate, which he devised to the defendants as trustees during the life of Eva Latham upon trust to permit her to receive the income of the estate until in their uncontrolled judgment she should become incompetent to have the control and management of the estate, in which event the trust in her favour was to cease. It appears that the defendants on February 4, 1907, decided that she was so incompetent, and thereupon her interest in the estate came to an end. The will then provided for what was to happen in such case. The trustees were to enter into and during the residue of her life continue in possession or receipt of the rents and profits of the White Rushes estate and were to "apply the whole or so much of the

(1) (1877) 2 App. Cas. 300. (2) (1831) 2 Cr. & J. 101.

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net income of the said hereditaments . . . . as the trustees in their absolute and uncontrolled discretion without being liable to account for the exercise of such discretion might deem right to or for the maintenance and support or otherwise for the benefit of the said Eva Latham." The defendants, acting under the trusts of that will, have applied and intend to apply certain moneys out of the income derived from the White Rushes estate for the benefit of Eva Latham by providing for her maintenance, and the Attorney-General claims that succession duty is payable on those sums as and when they are from time to time so applied.

The first question raised is whether such a gift is a legacy within the meaning of the taxing Acts. Now the Act in which the most comprehensive meaning is given to the term "legacy" is the Revenue Act of 1845, by s. 4 of which it is enacted that "Every gift by any will or testamentary instrument of any person which . . . . is or shall be payable or shall have effect or be satisfied out of or is or shall be charged or rendered a burden upon the real or heritable estate of such person or any real or heritable estate or the rents or profits thereof which such person hath had or shall have had any right or power to charge . . . . shall be deemed a legacy," and the question is whether these moneys which are intended to be so applied by the defendants when they are so applied will have been payable or have had effect or have been satisfied out of the testator's real estate or out of the rents and profits thereof. Prima facie they will undoubtedly have been so. But the argument for the defendants is that what is given by the will is not a legacy, but a part of the real estate itself. I do not think it is necessary to say whether it is part of the real estate itself or not. It is quite sufficient if it comes within the words of the section "shall be payable or shall have effect or be satisfied out of . . . . real estate . . . . or the rents or profits thereof," and it seems to me clear that it does so. I am fortified in that view by the case of *Attorney-General* v. *Jackson* (1), which is a much stronger case than the present. There the testator gave real estate to the defendants "to the use and intent that Joseph Troughton

(1) 2 Cr. & J. 101.

should during his life receive by and out of the said hereditaments and the rents thereof an annuity or clear yearly rent-charge of 500*l*. . . . with such power and remedies of distress and entry and perception of rents in case the said annuity of 500*l*. should be in arrear as are reserved to lessors for the recovery of rents on leases for years." It was contended that it was a devise of a freehold rent-charge and not a legacy, but the Court of Exchequer held that whether it was a devise of a freehold rent-charge or not it came within the very words of the schedule to the Act of 1815 as being a gift by way of annuity out of or charged upon the testator's real estate, and was consequently chargeable with legacy duty. I think, therefore, that the gift in the present case would come within the terms of that schedule, but in any event it comes within the express words of the Act of 1845 and therefore is to be deemed to be a legacy within the meaning of the Acts imposing duties on legacies.

The next point that is taken is that this gift for maintenance cannot be considered a legacy because it is subject to the absolute and uncontrolled discretion of the trustees. That is quite true, and I think it is correct to say that until the trustees have exercised that discretion in her favour Eva Latham will have received no benefit under the will, but as soon as they have applied money for her maintenance she will have derived a benefit. But then I must look at the Acts and see whether it is a benefit to which the Acts apply; and first I turn to s. 11 of the Act of 1796. By that section "If any benefit shall be given by any will or testamentary instrument in such terms that the amount or value of such benefit can only be ascertained from time to time by the actual application for that purpose of the fund allotted for such purpose or made chargeable therewith"—so that the Act presumes that there may be a benefit which cannot be ascertained till a later period—"or if the amount or value of any benefit"—so that the benefit need not be in money, but may be in kind—"given by any will or testamentary instrument cannot by reason of the form and manner of the gift be so ascertained that the duty can be charged thereon under any other of the directions herein contained then and in every such case such

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duty shall be charged upon the several sums of money or effects which shall be applied from time to time for the purposes directed by such will or testamentary instrument as separate and distinct legacies or bequests and shall be paid out of the fund applicable for such purposes or charged with answering the same." That seems to me to embrace the very case that I have to deal with. Then the schedule to the Act of 1815 says that "For every legacy specific or pecuniary or of any other description of the amount or value of 20*l.* or upwards given by any will or testamentary instrument of any person . . . . either out of his or her personal or movable estate or out of or charged upon his or her real or heritable estate" (to which words the Revenue Act, 1845, adds "or the rents and profits thereof") ". . . . and which shall be paid" certain duties shall be charged, and continues, "And all gifts . . . . by way of annuity or of any other partial benefit or interest out of any such estate or effects as aforesaid shall be deemed legacies within the intent and meaning of this schedule." That seems to shew that in a case of this kind where the trustees have full discretion as to the application of the testator's moneys, if they in fact apply them from time to time for the benefit of the person intended to be benefited, legacy duty is payable in respect of each such application. The Attorney-General is entitled to the declaration claimed.

Judgment for the Crown.

Solicitor for the Crown: *Solicitor of Inland Revenue.*

Solicitors for defendants: *Dowson, Ainslie & Garle, for Gibbons & Arkle, Liverpool.*

J. F. C.

GUEST, KEEN, & NETTLEFOLDS, LIMITED, Appellants *v.* FOWLER (Surveyor of Taxes), Respondent.

1910
March 3.

Revenue—Income Tax—Deductions—Association of Traders for keeping up Prices—Payments made by Trader to Association—"Money wholly and exclusively laid out or expended for the purposes of such trade"—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Cases* 1 *and* 2, *r.* 1; *Sched. D.*

The appellants, who were manufacturers of steel hoops, were, with two other firms who carried on similar businesses, members of an association, called the Steel Hoop Manufacturers' Association, which was formed for the purpose of keeping up prices and thus enabling its members to earn larger profits by agreeing to adhere to fixed prices and thereby preventing competition among themselves. By the rules of the association each of the firms was entitled to a fixed percentage of the total orders; the books of each firm shewing the quantities of steel hoops invoiced were to be audited every six months, and an account was then to be made up shewing the proportion due to each firm, and in the event of any firm having invoiced more than its proper percentage it was to pay into a pool the sum of 10*s.* on each ton of the excess, which amount the association distributed in due proportion amongst those firms who had invoiced less than their proportionate quantities. The appellants, in arriving at the amount of the profits of their trade assessable to income tax, claimed to deduct the excess of the total payments made by them to the association over the amounts received therefrom on an average of the three preceding years, such excess consisting of the excess of payments to the pool over the receipts therefrom, and payments towards the administration expenses of the association:—

Held, that the excess so paid by the appellants was "money wholly and exclusively laid out or expended for the purposes of" their trade within the meaning of r. 1 of the rules applicable to cases 1 and 2 of s. 100, Sched. D, of the Income Tax Act, 1842, and that therefore the appellants were entitled to the deduction claimed.

Case stated by Commissioners of Income Tax.

At a meeting of the Commissioners for the General Purposes of the Income Tax Acts for the division of Offlow South, for the purpose of hearing appeals, the appellants, of London Works, Smethwick, appealed against an additional assessment of 316*l.* 6*s.* made on them for the year 1907-8 under Sched. D of the Income Tax Acts on account of the net payments made by them

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to the Steel Hoop Manufacturers' Association, of which the appellants were members.

In the first assessment the payments were deducted in arriving at the amount of assessment, but were subsequently brought into charge by the additional assessment before referred to.

A copy of the rules and arrangements of the association (as far as they affect the appeal) was attached to the case.

The Steel Hoop Manufacturers' Association was mainly formed for the purpose of keeping up prices and thus earning larger profits by its members agreeing to adhere to fixed prices, and thereby preventing competition amongst themselves. The members were entitled to shares of the total orders received by the whole of the members in certain agreed proportions.

If any member invoiced more than the proper percentage a fixed amount of 10*s.* per ton on the excess had to be paid by that member to the association, which distributed the payment in due proportion amongst those members who had invoiced less than their proportionate quantities.

The assessment in question was made on the excess of the total payments made by the appellants over the amounts received from the said association computed on the yearly average of the three years to June 6, 1906, and might be divided into two parts :—

(1.) 74*l.* 16*s.*, the average excess of payments to the pool over the receipts therefrom.

(2.) 241*l.* 10*s.*, payments towards the administration expenses of the association.

The appellants contended that the payments made by the association out of the pool to its members formed part of the taxable income of such members, who had in fact paid the tax on the amounts so received, and the payments made towards the administrative expenses of the association, as far as 161*l.* 10*s.* 8*d.* of the said 241*l.* 10*s.* was concerned, were made to the secretary by way of salary and formed part of his taxable income, and he had in fact paid the tax thereon, and that these payments were an allowable deduction, as they were wholly and exclusively laid out for that portion of the business affected by the association, and were necessary disbursements thereto, and therefore formed an admissible deduction under the Income Tax Acts. *Moore* v.

Stewarts & Lloyds (1) was quoted in support of the contention. It was urged that the payments were as necessary as travellers' commission.

The respondent contended that all payments to, as well as sums received from, the association should be eliminated from the accounts; that the payments were not admissible as a deduction, as they did not come within the scope of the deductions allowed by any of the rules applying to Sched. D; and he in particular referred to the following provisions of the Income Tax Act, 1842:—

Sect. 100, Sched. D, case 1, r. 1: "The duty to be charged in respect thereof"—that is, in respect of any trade, manufacture, adventure, or concern in the nature of trade, not contained in any other schedule of the Act—"shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade . . . . and shall be assessed, charged, and paid without other deduction than is hereinafter allowed."

Sect. 100, Sched. D, cases 1 and 2, r. 1: "In estimating the balance of the profits or gains to be charged according to either of the first or second cases no sum shall be set against or deducted from or allowed to be set against or deducted from such profits or gains for any disbursements or expenses whatever not being money wholly and exclusively laid out or expended for the purposes of such trade."

Sect. 159: "In the computation of duty to be made under this Act in any of the cases before mentioned . . . . it shall not be lawful to make any other deductions therefrom than such as are expressly enumerated in this Act."

He further maintained that the payments were not necessary to the carrying on of the business, which would be able to proceed if such payments were not made. He cited the judgment of Collins M.R. in *Strong & Co.* v. *Woodifield* (2), "that expenses to come out of the profits after they are earned cannot be deducted," and pointed out that by arrangement 2 the payments would be made after the profits had been earned, and that in *Watney & Co.* v. *Musgrave* (3) it was decided that the costs

(1) (1906) 8 F. 1129. (2) [1905] 2 K. B. 350, at p. 356.
(3) (1880) 5 Ex. D. 241.

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and expenses to be deducted from the receipts were merely and only the costs and expenses of production of the articles. The case of *Rhymney Iron Co.* v. *Fowler* (1) was also cited.

The Commissioners decided that the payments in question did not form an allowable deduction in arriving at the amount assessable to income tax, and therefore confirmed the assessment.

The question for the opinion of the Court was whether the payments to the Steel Hoop Manufacturers' Association were a proper deduction to be made in arriving at the amount for assessment.

RULES AND ARRANGEMENTS REFERRED TO.

Pooling Arrangements.

1. Each firm is entitled to a share of the total orders received in following proportions:—

A.	37·72%
B.	31·44%
G. K. & N. . . .	30·84%

2. Books of each firm shewing quantities of steel hoops invoiced to be audited for each six months ending June 30 and December 31.

3. An account shall then be made up shewing proportion due to each firm under clause 1 of the total invoiced by all firms, and in event of any firm having invoiced more than proper percentage they shall pay into pool account 10*s*. on each ton in excess, which amount shall then be distributed in due proportion amongst those firms who shall have invoiced less than their proportionate quantities.

4. In the event of any of the hoop mills of any member being stopped by strikes or accidents or by any cause other than shortness of orders for a period of one full week or more the reduced output shall not entitle such firm to compensation from the pool under the previous clause, but said member shall report number of weeks his mills have been stopped before next pool account is made up, and his proportion of orders due shall be reduced to 1-26th for each week mills stopped, and percentage shall be arranged accordingly.

(1) [1896] 2 Q. B. 79.

5. Hoops rolled by any firm for own use which they would otherwise have to purchase shall be brought into pool account.

6. In the event of any member of association placing orders with another member of association as a matter of accommodation the weight of such orders shall for purpose of pool calculations be divided between said parties, who shall each include half only of the weight of such orders in sales returns unless proportion otherwise agreed between themselves.

7. All soft steel hoops not exceeding 20% carbon sold at specially agreed prices below the standard basis price for best steel hoops shall be excluded from pool account.

8. Any special price agreed upon for steel hoops of high grade which would otherwise be sold at the standard basis price does not thereby exclude such hoops from the pool account, but any particular transaction or any specific market or markets may at any time be excluded from the pool by consent of the whole of the members.

Rules.

1. Association shall be called Steel Hoop Manufacturers' Association.

2. Whole of members shall form a board, and a secretary shall be appointed to conduct general business of association.

3. All prices to be charged by association (except where a free hand is allowed) shall be fixed by board. Term "basis price" covers any inclusive or delivered price.

4. Any price agreed upon at a meeting shall be binding upon all parties, whether present at such meeting or not, but for any price otherwise arranged the secretary shall obtain the written consent of all the members.

5. Basis price not to be reduced by any method, either directly or indirectly. Shall not be lowered nor made net by deducting all or any portion of discount or commission to be allowed at settlement.

6. A basis price shall always be for not less than two ton lots, and for such sizes as are not included in extra lists.

7. For quantities under two tons price shall be increased by difference between two ton rate and the smaller rate from the

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makers' works or extra carriage making carriage equal to two tons shall be charged.

8. Separate basis price shall from time to time be fixed for export trade and for home trade.

9. Notwithstanding these provisions for regulation of prices, it shall be competent to fix by common agreement a special price for any delivery that circumstances may require.

10. No member shall withdraw from association until after expiration of three months' notice given in writing to secretary of his intention to do so, and he shall during period of such notice adhere in all respects to prices, rules, and regulations of association.

Sir R. B. Finlay, K.C. (*P. G. Henriques* with him), for the appellants. The net sums paid by the appellants to the association are the proper subject-matter of deduction from the profits and gains of the appellants' trade under the Income Tax Acts. By case 1, r. 1, of s. 100, Sched. D, of the Income Tax Act, 1842, the duty to be charged is to be computed upon the full amount of "the balance of the profits or gains" of the trade; and by r. 3, in estimating the balance of profits and gains certain deductions are forbidden. Rule 3 is a purely negative rule, prescribing what deductions are not to be allowed. The scheme of the Act is to tax net profits, such net profits being arrived at by refusing to allow deductions for certain expenses which business men would prudently allow before estimating their own net profits. Then by r. 1 of the rules applicable to cases 1 and 2 it is provided that in estimating the balance of the profits or gains no sum shall be set against or deducted from such profits or gains "for any disbursements or expenses whatever, not being money wholly and exclusively laid out or expended for the purposes of such trade, manufacture, adventure, or concern." The sums paid to the association by the appellants were expenses wholly and exclusively laid out or expended for the purposes of their trade within the above rule. The association was a piece of machinery formed for the purpose of preventing competition and thus keeping up prices, and therefore for the purpose of earning profits; and the other members who receive larger sums

from the association than they pay to it have to account for the difference as part of their profits. The facts found in the case completely establish the contention of the appellants. The statement that the association is "mainly" formed for the purpose of keeping up prices and thus earning larger profits means "exclusively." There is no other possible purpose to be found in the rules or arrangements of the association. The dicta in *Watney & Co.* v. *Musgrave* (1) have been commented upon in subsequent cases as going too far: *Reid's Brewery Co.* v. *Male* (2); *Smith* v. *Lion Brewery Co.* (3) In this latter case the payments made by a brewery company in respect of its licensed houses for the compensation charge under the Licensing Act, 1904, were held to be properly allowable as deductions in ascertaining the balance of the profits and gains of the company. The principle of the decisions in *Reid's Brewery Co.* v. *Male* (2), *Gresham Life Assurance Society* v. *Styles* (4), and *Moore* v. *Stewarts & Lloyds* (5) is applicable. The expense was incurred in the present case for the purpose of earning profits, and was not a payment made out of profits after they had been earned, as in *Strong & Co.* v. *Woodifield.* (6) The decision in *Rhymney Iron Co.* v. *Fowler* (7) is not against the appellants, because there the expense sought to be deducted was a payment made by a colliery company to a coalowners' association which indemnified its subscribers against losses occasioned by strikes. That is not a payment made for the purpose of earning profits. The decision of the Commissioners was therefore wrong.

Sir W. S. Robson, A.-G., (*W. Finlay* with him), for the respondent. When once the profits of a business have been ascertained no deduction for expenses payable out of those profits can be allowed, unless there is some statutory provision expressly authorizing the deduction: *Strong & Co.* v. *Woodifield* (8); *Gresham Life Assurance Society* v. *Styles.* (9) In ascertaining what are the profits of a business a deduction may be

(1) 5 Ex. D. 241.
(2) [1891] 2 Q. B. 1, at p. 9.
(3) [1909] 1 K. B. 711, at p. 718; [1909] 2 K. B. 912, at p. 926.
(4) [1892] A. C. 309.
(5) 8 F. 1129.
(6) [1905] 2 K. B. 350; [1906] A. C. 448.
(7) [1896] 2 Q. B. 79.
(8) [1905] 2 K. B. 350, at p. 356.
(9) [1892] A. C. 309, at p. 315.

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made of sums necessarily expended for the purpose of earning those profits. There may be sums which are reasonably expended for that purpose, but which cannot be deducted, as in *Watney & Co.* v. *Musgrave.* (1) In the present case there is an association of traders formed for two objects. In the first place they make an arrangement as to the division among themselves of the orders which they receive. That is merely a division of the opportunities of making profits, and an expense incurred thereby is not an expense incurred in making profits. In the second place they arrange how in certain circumstances they will divide their profits, after they have been earned, among each other. Beyond those two objects there is an intention by those two means to increase their profits, but that intention is not the sole object. The mere intention to obtain an ultimate increase of profits is not enough. The method by which that intention is carried out must be looked at. An expense can only be deducted if it is "money wholly and exclusively laid out or expended for the purposes of such trade." The expense must be a proper trade expense; it must be directly connected with the trade and must be expended for the purpose of the trade. Money spent in hospitality for the purpose of increasing the business done, and consequently the profits, cannot be deducted. Nor can money subscribed to an association for the protection of the particular trade in case of disputes with the workmen, and to indemnify the trader against loss caused by strikes, be deducted: *Rhymney Iron Co.* v. *Fowler.* (2) Such an expense may be reasonably incurred for ensuring the continuous maintenance of the profits of the trade, but it is not directly connected with the trade and cannot be deducted in ascertaining the profits. It is in truth a payment out of profits. That case is exactly in point. A payment to a rival trader to prevent competition and underselling is a payment out of profits and cannot be deducted, although it may lead to an increase of profits. The payments in the present case are payments out of profits in order to prevent competition and so to increase profits. The payment is not an expense directly connected with the production or sale of the articles; it is collaterally and remotely, but not

(1) 5 Ex. D. 241. (2) [1896] 2 Q. B. 79.

directly, connected with the trade, and is not wholly and exclusively laid out or expended for the purposes of the trade: *Brickwood & Co.* v. *Reynolds.* (1) It is not like an advertisement which may be directly connected with the sale of the article advertised.

Further, the case has only found that the association was "mainly formed for the purpose of keeping up prices and thus earning larger profits." It is not found as a fact that the association was formed exclusively for that purpose. So far as the documents are concerned, the whole arrangement is before the Court, but there is nothing to prevent the three firms who are the members of the association from agreeing, when they meet, to act outside the documents. The finding is therefore binding upon the Court. The decision of the Commissioners was right.

Sir R. B. Finlay, K.C., was not called upon to reply.

BRAY J. In this case the contention of the Attorney-General is that these payments were not a disbursement or expense "wholly and exclusively laid out or expended for the purposes of" the appellants' trade. In the first place it is necessary to see what is the nature and what is the object of this expenditure. The rules of the association, and the pooling arrangements, so far as they are material, are set out in the case, and therefore I have the proper means of forming an opinion upon those points. In the first place the object is to fix a price below which none of the members of the association shall sell steel hoops. That is the object which each member has in entering into this arrangement. Each member has to pay a price for securing that arrangement, and the mode of calculating that price is undoubtedly a somewhat complicated one; it is to be ascertained by the payment of a fixed sum of 10*s.* on each ton of steel hoops which is invoiced by the member in excess of his percentage share of the total orders received, and that sum is paid into the pool account of the association. That is the consideration which the appellants in this case have paid into the pool account for the undertaking of the two other firms not to sell

(1) [1898] 1 Q. B. 95.

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their goods below a certain price. The sums so paid into the pool account are distributed among the member or members of the association who shall have invoiced less than their proportionate quantities of steel hoops. That is the substance of the arrangement between those three firms. The question which I have to determine is whether that payment into the pool after deducting the sums received from the pool is a disbursement or expense "wholly and exclusively laid out or expended for the purposes of such trade," that is, the appellants' trade. What is the trade? It is the manufacture and sale of steel hoops. The steel hoops have first to be made and then to be sold; and, as has been pointed out in more than one case, the trade is not only the manufacturing of the article, but also the selling of it. The selling consists of two things. There is, first, the finding of a customer; and there is, secondly, the making of a bargain with him as to the price, the object being to get the highest price. The arrangement made by the three firms who form the Steel Hoop Manufacturers' Association does not concern itself with the finding of customers. It relates solely to the fixing of the price. If the appellants are able to make an arrangement with their competitors that the latter will not sell below a certain price, they will in all probability obtain a better price for their goods. Part of the appellants' trade is to obtain the highest price for their goods. I have therefore to see whether this money in respect of which the appellants have been assessed to income tax is money wholly and exclusively laid out or expended for the purposes of their trade—that is, so far as the particular purpose which I am considering is concerned, for the purpose of selling their goods to the best advantage. It is found in the case that "the Steel Hoop Manufacturers' Association was mainly formed for the purpose of keeping up prices and thus earning larger profits by its members agreeing to adhere to fixed prices and thereby preventing competition amongst themselves." To my mind, if instead of the word "mainly" the word "exclusively" had been used, the point would really not have been arguable, as the finding of fact would have been against the Crown. In order to see what meaning is to be attached to the word "mainly" I have to look through the rules

and arrangements of the association in order to ascertain if the association was formed for any other object whatever. I have done so, and I cannot find any other object. Therefore it seems to me that the sole object of the association is to keep the price of steel hoops up to a certain level and thereby to enable the individual members of the association, including the appellants, to earn larger profits in their trade. In my opinion, unless there is some authority to the contrary, I am bound to find that the appellants have made out that this disbursement or expense was money wholly and exclusively laid out or expended for the purposes of their trade, and that they are not liable to be assessed to income tax upon it.

Several cases have been referred to, but I need only refer to some of them. The first case is *Watney & Co.* v. *Musgrave.* (1) That case has been commented upon in later cases, and the true ground of the decision was that the expenditure sought to be deducted, namely, the payment of premiums on leases of licensed houses, was a capital expenditure and not a trade expense. The next case is *Rhymney Iron Co.* v. *Fowler.* (2) In that case the appellants, who were the owners of a colliery, were members of a coalowners' association and as such paid a subscription to it, and the association, in consideration of that payment, indemnified its members against losses occasioned by strikes. The reasons given by the learned judges who decided that case for holding that that payment was not an expense wholly and exclusively laid out or expended for the purposes of the trade were these. Pollock B., after referring to the above words in Sched. D, cases 1 and 2, r. 1, said (3): "It seems to me, without adding to those words, it would be sufficient to say this is not money laid out for the purposes of such trade; it is money laid out in order to provide for an unfortunate contingency by reason whereof the trade cannot be worked. That is a very different thing." Bruce J. said (4): "It is not for the maintenance of the machine for the purpose of carrying on the business, but it is for the maintenance of the machine while the business is not being carried on." That reasoning

(1) 5 Ex. D. 241.
(2) [1896] 2 Q. B. 79.
(3) Ibid. at p. 83.
(4) Ibid. at p. 84.

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clearly distinguishes that case from the present. The only other case to which I wish to refer is *Brickwood & Co.* v. *Reynolds.* (1) In that case a brewery company claimed, in arriving at the balance of the profits and gains of their trade, to be allowed a deduction in respect of the repairs of tied licensed houses which were let to and occupied by their tenants. The Court gave two grounds for refusing to allow the deduction. One was that the money expended on the repairs was not expended exclusively for the purposes of the appellants' trade as brewers, but for many other things, one being for the purposes of the trade of the publicans who occupied the houses. The other was that the money was not expended upon the repairs of premises occupied by the persons assessed. That is quite a different case from the present. I do not think that any of these authorities really bear upon the question I have to decide.

The result is that, in my opinion, the net payments by the appellants to this association ought to have been allowed as a deduction under the Income Tax Acts. The appeal will therefore be allowed.

Appeal allowed.

Solicitors for appellants: *Beale & Co.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

(1) [1898] 1 Q. B. 95.

W. F. B.

THE QUARTER SESSIONS FOR THE COUNTY OF GLAMORGAN, APPELLANTS *v.* WILSON (SURVEYOR OF TAXES), RESPONDENT.

1910
March 3, 8.

Revenue—Income Tax—Interest of Money—Compensation Fund—Deposit in a Bank—Assessability of Quarter Sessions — Payment of Interest without Deduction of Tax—Liability of Payee—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *ss.* 40, 43, *Sched. D—Customs and Inland Revenue Act*, 1888 (51 & 52 *Vict. c.* 8), *s.* 24, *sub-s.* 3—*Licensing Act*, 1904 (4 *Edw.* 7, *c.* 23), *s.* 3; *Licensing Rules*, 1904, *r.* 60.

Quarter sessions, as the compensation authority under the Licensing Act, 1904, are assessable to income tax in respect of the interest payable upon so much of the compensation fund as is placed upon deposit in a bank.

Sect. 24, sub-s. 3, of the Customs and Inland Revenue Act, 1888—which provides that upon payment of any interest of money charged with income tax under Sched. D, and not payable out of profits or gains brought into charge to such tax, the person paying the interest shall deduct thereout the rate of income tax in force, and shall render an account to the Commissioners of Inland Revenue of the amount so deducted, and such amount shall be a debt from such person to the Crown—does not relieve the person to whom the interest is paid from liability to pay the income tax where the tax has not been deducted by the person who pays the interest, but merely gives an additional remedy to the Crown against the latter person.

CASE stated by Commissioners of Income Tax.

At a meeting of the Commissioners for the General Purposes of the Income Tax Acts, held at Cardiff, the quarter sessions for the county of Glamorgan, by the clerk of the peace for the county, appealed against an assessment made upon them for the year ending April 5, 1908, of 16*l.* 17*s.* 11*d.*, being income tax at the rate of 1*s.* in the pound on 337*l.* 19*s.*, the interest received in the previous year on money on deposit in the National Provincial Bank of England, Limited (Cardiff branch), under the following circumstances:—

By the Licensing Act, 1904, the justices of a licensing district have power under the provisions of s. 1 of the Act to refer to quarter sessions the question of the renewal of existing on licences.

By s. 2 of the Act it is provided that where quarter sessions

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refuse the renewal of such licences compensation shall be paid to the persons interested in the licensed premises in manner therein set forth.

By s. 3, sub-ss. 1 and 2, of the Act, quarter sessions are directed to impose in respect of all existing on licences renewed in respect of premises within their area charges not exceeding the rates set out in the First Schedule to the Act, and these charges are directed to be levied and paid together with and as part of the duties on the corresponding excise licences, and the amount produced in each year is directed to be paid over to the quarter sessions by the Commissioners of Inland Revenue in accordance with rules made by the Treasury for the purpose. By sub-s. 4, "Any sums paid under this Act to quarter sessions in respect of the charges under this section or received by quarter sessions from any other source for the payment of compensation under this Act shall be paid by them to a separate account under their management, and the moneys standing to the credit of that account shall constitute the compensation fund."

By s. 5 of the Act quarter sessions may delegate any of their powers and duties under the Act to a committee.

Sect. 6 of the Act gives a Secretary of State power to make rules for carrying into effect the Act and, inter alia, to regulate the management and application of the compensation fund and the audit of the accounts of quarter sessions.

In accordance with this power the Secretary of State for the Home Department made certain rules dated December 20, 1904, and entitled the Licensing Rules, 1904. By r. 2 of these rules the compensation authority means as respects a county the quarter sessions for that county and includes, with regard to matters delegated to a committee appointed under sub-s. 2 of s. 5 of the Licensing Act, 1904, the committee to which the matter is delegated.

By r. 49 it is provided that the compensation authority shall appoint some person or some bank to be their treasurer, and that on such appointment notice is to be sent thereof to the Commissioners of Inland Revenue.

By r. 57 it is directed that "all sums received by the compensation authority in respect of charges under the Act, or

from any other source for the payment of compensation, shall be paid to the treasurer of the compensation authority and credited by him to the compensation fund"; and by r. 59 it is directed that "money authorized by the compensation authority to be paid out of the compensation fund shall not be paid except on an order signed by two members of the compensation authority and by the treasurer of that authority, or, if the treasurer is a bank, the clerk of that authority."

By r. 60 it is provided that "it shall be the duty of the compensation authority to see that any balance, in excess of current requirements, standing to the credit of the compensation fund is placed on deposit at interest, or invested in any manner authorized by law for investments by trustees, and that the interest thereon is paid to the credit of the compensation fund."

The quarter sessions for the county of Glamorgan delegated their powers under the Licensing Act, 1904, to a committee appointed by them, and under the provisions of the Act on the recommendation of this committee, called the county licensing committee, the quarter sessions made charges as authorized by the Act for the purpose of providing a compensation fund. They appointed the National Provincial Bank of England to be their treasurer, and duly sent to the Commissioners of Inland Revenue a notification of the appointment. During the year ending April 5, 1907, a large balance standing to the credit of the compensation fund, which fluctuated from time to time, was on deposit at the National Provincial Bank of England, and the interest thereon credited to the compensation fund for the year ending April 5, 1907, amounted to the sum of 337*l.* 19*s.* (1). It was admitted that such interest was not annual, and that the rate of interest varied from time to time with the bank rate.

By s. 40 of the Income Tax Act, 1842, "All bodies politic, corporate, or collegiate, companies, fraternities, fellowships, or societies of persons, whether corporate or not corporate, shall be chargeable with such and the like duties as any person will under and by virtue of this Act be chargeable with, and the chamberlain or other officer acting as treasurer, auditor, or

(1) It was admitted that the bank had not deducted the income tax upon the 337*l.* 19*s.* before crediting that sum to the compensation fund.

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receiver for the time being of every such corporation, company, fraternity, fellowship, or society shall be answerable for doing all such acts, matters, and things as shall be required to be done by virtue of this Act in order to the assessing such bodies corporate, companies, fraternities, fellowships, or societies to the duties granted by this Act and paying the same."

By s. 2, Sched. D, of the Income Tax Act, 1853, income tax is to be charged, inter alia, as follows: "For and in respect of all interest of money, annuities, and other annual profits and gains not charged by virtue of any of the other schedules contained in this Act."

The appellants contended (*a*) that the quarter sessions were a judicial body and could not be assessed; (*b*) that they had no beneficial interest in the compensation fund, but only the power of distributing it amongst the persons to whom it belonged, and that this distribution was made by the Court's judicial decision under power given them by the Licensing Act, 1904.

The respondent contended (*a*) that the income in question was assessable under case 3, Sched. D, of s. 100 of the Income Tax Act, 1842; (*b*) that there was no statutory exemption by which the quarter sessions could claim to be exempted; (*c*) that the interest was taxable, and that it was immaterial for what purpose it was intended that the interest should be applied, or that the quarter sessions only had the power of distributing the compensation fund and any interest which might accrue thereon amongst the persons entitled thereto, and he cited *Mersey Docks and Harbour Board* v. *Lucas* (1) in support of this contention.

The Commissioners were of opinion that the assessment was rightly made and confirmed the same accordingly.

Danckwerts, K.C. (*R. E. L. Vaughan Williams* with him), for the appellants. The quarter sessions are not assessable to income tax. The proper person to assess is the treasurer of the compensation authority. The quarter sessions, in performing their duties under the Licensing Act, 1904, act as a Court. In a county the quarter sessions are bound under s. 5, sub-s. 2, to delegate their power of refusing the renewal of a licence under

(1) (1883) 8 App. Cas. 891.

the Act and matters consequential thereon to a committee appointed by them, and the term "compensation authority" in the Licensing Rules, 1904, made by the Secretary of State for the Home Department under s. 6 of the Act, means (r. 2) the quarter sessions for the county, and includes the committee so appointed. By r. 49 the compensation authority must appoint a treasurer, and by r. 57 all sums received by the compensation authority in respect of charges under the Act shall be paid to the treasurer. The quarter sessions are not an incorporated body, and therefore cannot hold property. The legal property in the compensation fund is in the treasurer, who holds it as a trustee. It is not disputed that income tax is payable upon this sum of 337*l.* 19*s.*, but the treasurer is the proper person to be assessed, and not the quarter sessions. The quarter sessions do not come within any of the bodies mentioned in s. 40 of the Income Tax Act, 1842. The quarter sessions are a Court having judicial functions with some administrative duties attached, and a Court does not come within s. 40; s. 43 is a special section dealing with Courts. The treasurer appointed by the compensation authority is assessable under s. 43 as the "receiver" appointed by the Court of quarter sessions and having the direction and control of the fund, and he can reimburse himself out of the moneys in his hands. In dealing with the compensation fund the quarter sessions and the committee appointed by them act as a Court: *Rex* v. *Southampton Licensing Justices* (1); like the Court of Chancery when dealing with funds under its control. A Court cannot be assessed to income tax in respect of funds under its control. Sect. 40 is not applicable to quarter sessions, and there is no other section under which they can be assessed.

Secondly, the recipient of the interest cannot now be assessed. By s. 24, sub-s. 3, of the Customs and Inland Revenue Act, 1888, upon payment of any interest of money charged with income tax under Sched. D, and not payable, or not wholly payable, out of profits or gains brought into charge, the person paying the interest "shall deduct thereout" the income tax, and the person making the payment is made a debtor to the Crown in respect of the amount of the tax, whether he makes the deduction or pays

(1) [1906] 1 K. B. 446.

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over the interest without deduction. The payer being chargeable, the payee cannot also be chargeable with it. The general intention of the Income Tax Acts, 1842 and 1853, is only to charge one person with the same tax. The payee was the person chargeable under those Acts. Sect. 24, sub-s. 3, of the Act of 1888 has made the payer in the circumstances therein stated chargeable. That enactment has impliedly repealed the former law that the payee is the person to be assessed. In the present case the bank were bound to deduct the income tax, and are debtors to the Crown for the amount and are bound to account to the Crown for it. [*London County Council* v. *Attorney-General* (1) was referred to.]

Sir S. T. Evans, S.-G. (*W. Finlay* with him), for the respondent. The quarter sessions are assessable under s. 40 of the Income Tax Act, 1842, either as a "body politic" or a "society of persons." That section is intended to include all bodies or groups of persons. There is no decision which says that a judicial body cannot be assessed to income tax. In many cases the justices of a county have been assessed: see *Coomber* v. *Justices of Berks* (2); *Bray* v. *Justices of Lancashire*. (3) It is not material whether the justices in dealing with the compensation fund act judicially or administratively; but if any such distinction is to be drawn, the justices in dealing with the compensation fund act administratively. Their functions as the compensation authority in connection with the compensation fund are laid down in the Licensing Rules, 1904, made by the Home Secretary under s. 6 of the Licensing Act, 1904, and those rules and the forms in the schedule shew that their duties are administrative. Rule 60 requires them to cause any balance, in excess of current requirements, standing to the credit of the compensation fund to be placed on deposit at interest. The justices in quarter sessions are therefore assessable. [*Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson* (4) was referred to.]

With regard to the second point, s. 24, sub-s. 3, of the Customs and Inland Revenue Act, 1888, does not absolve the recipient of

(1) [1901] A. C. 26.
(2) (1883) 9 App. Cas. 61.
(3) (1889) 22 Q. B. D. 484.
(4) [1892] 1 Q. B. 431.

the interest of money from liability to be assessed to income tax. The Income Tax Acts charge the person or persons receiving the interest, and s. 24, sub-s. 3, of the Act of 1888 merely gives an additional remedy to the Crown by imposing liability upon the payer as well, and it has not taken away the remedy of the Crown against the payee if the payer has omitted to deduct the tax. The point is concluded by the case of *Leeds Benefit Building Society* v. *Mallandaine* (1), where the recipient of the interest of money was assessed to income tax. The passage towards the end of the judgment of A. L. Smith L.J. (2) and also the judgment of Wills J. in that case in the Divisional Court (3) shew that the point was present to the minds of both Courts when they decided the case. In *London County Council* v. *Grove* (4) s. 24, sub-s. 3, of the Act of 1888 was cited in argument, and the recipients of the interest were held liable to be assessed. The quarter sessions are therefore assessable.

Danckwerts, K.C., in reply. In *Lord Advocate* v. *Edinburgh Corporation* (5) it was decided that s. 24, sub-s. 3, of the Act of 1888 applied to interest payable on loans for less than a year, and therefore that section covers every case of interest of money not payable out of profits or gains brought into charge. Two persons cannot be charged with the same tax, because if they could the Crown would get the tax twice over, which would be contrary to the intent of the Income Tax Acts and obviously unjust: *Gilbertson* v. *Fergusson* (6); *Leeds Benefit Building Society* v. *Mallandaine* (7); *Attorney-General* v. *Ashton Gas Co.* (8); *Attorney-General* v. *London County Council.* (9) The payee is not now chargeable. In the cases of *Leeds Benefit Building Society* v. *Mallandaine* (1) and *London County Council* v. *Grove* (4), which were relied upon by the Crown, this point was not taken. Next, s. 40 of the Income Tax Act, 1842, does not include a Court of quarter sessions. Quarter sessions are not a "body politic." That term is defined in Wharton's Law

(1) [1897] 2 Q. B. 402.
(2) Ibid. at p. 411.
(3) (1897) 3 Tax Cases, 577, at p. 586.
(4) (1896) 3 Tax Cases, 508.
(5) (1903) 6 F. 1.
(6) (1881) 7 Q. B. D. 562, at p. 570.
(7) [1897] 2 Q. B. 402, at p. 412.
(8) [1904] 2 Ch. 621, at p. 624.
(9) [1907] A. C. 131.

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Lexicon as "the nation; also a corporation." A body of individuals, such as the justices of a county, are not a body politic. The treasurer is the proper person to assess under s. 43. [He also referred to *Rex* v. *Woodhouse* (1).]

Cur. adv. vult.

March 8. BRAY J. In this case the quarter sessions for the county of Glamorgan appeal against an assessment to income tax on 337*l.* 19*s.*, being interest received during the year ending April 5, 1907, on a sum of money placed on deposit in the National Provincial Bank of England.

Two objections to the assessment were taken before me. It was said in the first place that the quarter sessions could not be assessed; it was said in the second place that, since the duty has been imposed upon the bank which pays the interest to deduct the tax, the person receiving the interest can no longer be assessed. It is not now contended that income tax is not payable in respect of this money. Such a contention would be wholly untenable. It is conceded that in one way or another, either by deduction by the bank or otherwise, income tax is payable upon this sum. The points, therefore, which have been raised are purely technical, and do not seem to me to possess any merits; still, as they have been raised, I must decide them.

With regard to the first question, namely, whether quarter sessions can be assessed, it is necessary to see what kind of body quarter sessions are. It is clear that they are a body who can instruct a solicitor and who can appeal to this Court. They are therefore a body. They have certain powers and duties conferred upon them in their capacity as the compensation authority under the Licensing Act, 1904. By s. 2, sub-s. 1, of the Act, where quarter sessions refuse the renewal of an existing on licence under the Act a sum equal to the difference between the value of the licensed premises and the value which those premises would bear, if they were not licensed premises, shall be paid as compensation to the persons interested in the licensed premises. The other sub-sections of that section provide for

(1) [1906] 2 K. B. 501, at pp. 512, 513, 535.

the mode in which that sum is to be ascertained. Sect. 3 deals with financial provisions, and under sub-s. 1 the quarter sessions shall in each year, unless they certify to the Secretary of State that it is unnecessary to do so, impose in respect of all existing on licences which are renewed charges not exceeding the rates set out in Sched. I. to the Act; and by sub-s. 2 the amount produced by those charges is to be paid by the Commissioners of Inland Revenue, who in the first place collect it, to the quarter sessions. By sub-s. 4, "Any sums paid under this Act to quarter sessions in respect of the charges under this section, or received by quarter sessions from any other source for the payment of compensation under this Act, shall be paid by them to a separate account under their management, and the moneys standing to the credit of that account shall constitute the compensation fund." They are therefore bound to pay the money so received into a separate account, and the money standing to the credit of that account is called the "compensation fund." Under sub-s. 5 the quarter sessions are entitled to be paid out of the compensation fund any expenses incurred by them in the payment of compensation under the Act or otherwise in the exercise of their powers or in the performance of their duties under the Act. Hence the Legislature presumes that the quarter sessions can as a body incur expenses. The sub-section further gives the quarter sessions power to borrow upon the security of the compensation fund for the purpose of paying compensation under the Act. Rules have been made by the Secretary of State for the Home Department in pursuance of s. 6 of the Act called the Licensing Rules, 1904, and r. 35, which comes under the heading "Payment of Compensation Money," provides that "on the day fixed the compensation authority shall pay to each person entitled to compensation his share of the compensation money," &c. Then there are rules dealing with "officers," r. 49 of which provides that "the compensation authority shall appoint some person or some bank to be their treasurer, and the treasurer (if not a bank) shall give to the compensation authority such security as they may require." The treasurer, therefore, is not the owner of the money; he is merely the officer of the quarter sessions. That is

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made clear by r. 51, which provides that "the remuneration of the clerk and of the treasurer and any other officers appointed under these rules shall be such as may be fixed by the compensation authority with the consent of the Secretary of State." There are a number of rules, from r. 55 to r. 61, both inclusive, which deal with the compensation fund. By r. 57, "All sums received by the compensation authority in respect of charges under the Act, or from any other source for the payment of compensation, shall be paid to the treasurer of the compensation authority, and credited by him to the compensation fund." By r. 59, "Money authorized by the compensation authority to be paid out of the compensation fund shall not be paid except on an order signed by two members of the compensation authority and by the treasurer of that authority, or, if the treasurer is a bank, the clerk of that authority." By r. 60, "It shall be the duty of the compensation authority to see that any balance, in excess of current requirements, standing to the credit of the compensation fund is placed on deposit at interest, or invested in any manner authorized by law for investments by trustees, and that the interest thereon is paid to the credit of the compensation fund." By r. 61, "(1.) It shall be the duty of the compensation authority to cause proper accounts to be kept in connection with the compensation fund. . . . ." Then follow rules relating to the audit of the accounts of the compensation authority, and to borrowing by the compensation authority and the repayment of money borrowed. Therefore it is clear that the quarter sessions, acting as the compensation authority, are persons who have to receive and to pay moneys.

It is said on behalf of the Crown that s. 40 of the Income Tax Act, 1842, covers this case. It does not seem to me to be necessary to decide whether quarter sessions come within that section as one of the bodies therein specified, because if they are not one of those bodies they are at all events a collection of individuals, and a collection of individuals are persons, and when a "person" can be assessed to income tax a collection of individuals may be assessed. (1) Therefore it seems to me to be quite unnecessary to decide whether quarter sessions come

(1) See s. 192 of the Income Tax Act, 1842.

within s. 40 or not. They either come within s. 40, or, if they do not, they are persons and assessable as such. It is said on behalf of the appellants that the treasurer of the compensation authority is a "receiver" appointed by the Court of quarter sessions and is assessable under s. 43. In my opinion that section was not intended to apply to such a person as the treasurer of the compensation authority. It applies to the ordinary case of a receiver appointed by the Court of Chancery or by some other Court. Therefore that section does not affect the question before me. For these reasons I am of opinion that the quarter sessions are assessable to the income tax and that that ground of appeal fails.

The other ground is that, inasmuch as s. 24, sub-s. 3, of the Customs and Inland Revenue Act, 1888, makes it the duty of the person who pays the interest to deduct the amount of the income tax from the interest which he pays and to account for it to the Commissioners of Inland Revenue, and inasmuch as the section makes him a debtor to the Crown in respect thereof, whether he deducts it or not, that enactment must be considered as impliedly repealing the provision of the Income Tax Acts which makes the person who receives the interest chargeable. In my opinion there is no such repeal at all. There is no inconsistency between the two enactments. Sect. 24, sub-s. 3, of the Act of 1888 simply gives the Crown a remedy against the person paying as well as against the person receiving the interest. It is an additional remedy; and where, as in this case, the person paying the interest has not deducted the income tax and the persons receiving it have received it in full without any deduction, I have no doubt that these latter persons, that is, in this case the quarter sessions, are chargeable and have been properly assessed.

Both grounds of appeal fail, and the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellants: *Broad & Co.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

W. F. B.

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[IN THE COURT OF APPEAL.]

CHING *v.* SURREY COUNTY COUNCIL.

Negligence—Elementary School—Local Education Authority—County Council—Duty to maintain School Premises—Injury to Pupil caused by Want of Repair—Education Act, 1902 (2 *Edw.* 7, *c.* 42), *ss.* 5, 7—*Elementary Education Act*, 1870 (33 & 34 *Vict. c.* 75), *ss.* 5, 18, 19.

The plaintiff, a pupil at a public elementary school provided by the defendants, a county council, as the local education authority, fell, while playing in the playground attached to the school, through his foot being caught in a hole existing in the asphalt pavement of the playground, and, in consequence, sustained injury. In an action brought by the plaintiff against the county council to recover damages for the injury so sustained by him, the jury found that he was injured through the negligence of the defendants:—

Held, affirming the judgment of Bucknill J., that the action was maintainable on the ground that, by the Education Act, 1902, a statutory duty of keeping the school premises in a state of repair was imposed upon the defendants, and they were responsible for neglect of that duty by those who actually managed the school.

Application for judgment or a new trial in an action tried before Bucknill J. with a jury.

The action was for personal injuries. The facts are fully stated in the report of the case in the Court below (1), and may, sufficiently for the purposes of this report, be more briefly stated as follows: The plaintiff, a boy about nine years of age, was a pupil in a public elementary school provided by the defendants, as the local education authority. While playing in a shed, which formed part of the playground attached to the school, and which was paved with tar paving, he fell, through his foot being caught in a hole in the tar paving, and a bone of his left arm was broken. The existence of this hole, which was stated by witnesses to have been between three and four inches in depth, and as large as a boy's cap in circumference, had been known by the plaintiff for about six months. No contributory negligence was charged against the plaintiff. The caretaker of the schoolhouse knew that there were two holes in the floor of the playing shed, and had been in the habit of filling them up daily with fine gravel to

(1) [1909] 2 K. B. 762.

level them with the paving, but he did not report their existence to the managers of the school or the head teacher, because he did not consider them dangerous. The head teacher had become aware of the existence of these holes before the accident, but he made no report about them, because he did not think they were dangerous so long as they were filled up by the caretaker as above described. The clerk of the works to the Surrey Education Committee, who gave evidence, admitted that it was his duty to inspect provided school premises from time to time and report directly to the defendants, or to the education committee of the defendants, what was necessary to be done by way of repairs, and that all repairs to the asphalt paving of playgrounds of such schools were invariably carried out by the education committee of the defendants, and not by the school managers, and were paid for by the defendants.

The jury, in answer to a question left to them by the learned judge, found that the plaintiff was injured in consequence of the negligence of the defendants, and assessed the damages at 83*l.* 19*s.* 6*d.* The learned judge on further consideration gave judgment for the plaintiff for the damages assessed by the jury.

Avory, K.C., and *Guy Lushington*, for the defendants. In the first place, there was no sufficient evidence of any negligence on the part of any one responsible for the state of the school premises to go to the jury, and, if there was, their verdict was against the evidence. This is not a case in which it can be said that there was something in the nature of a trap or hidden danger, because the plaintiff was well aware of the existence of this hole in the pavement. The mere fact that such a hole as this in the floor of the playground was allowed to exist cannot be evidence of negligence. If it were, then the existence of any inequality in the surface of a playground, such as a projecting stone in a path, against which a boy might catch his foot, or any furrow or ditch in a field used as a playing field, would be evidence of negligence.

Secondly, if there was negligence for which any persons are responsible, the county council are not the persons responsible, but the managers of the school. By the Education Act,

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1902, s. 6, sub-s. 1, the management of a provided school, in cases where the local education authority are a county council, is vested in a body of managers, a majority of whom are to be appointed by that council, but the remainder by the minor local authority, in this case an urban district council: see s. 24, sub-s. 2. The managers are an independent statutory body, which is not as a whole appointed by the county council, and cannot be considered as their agent or servant. By s. 17, sub-s. 2, all matters relating to the exercise by the council of their powers under the Act, except the power of raising a rate or borrowing money, are to stand referred to an education committee, which by sub-s. 3 may consist partly of persons who are not members of the council. The bodies, therefore, who in point of fact deal with the matters connected with the management of the school do so as independent statutory bodies, by virtue of the provisions of the statute, and not as the delegates or agents of the county council, so that the principle qui facit per alium facit per se, upon which a principal or master is made responsible for the act or omission of his agent or servant, is not applicable. The learned judge in the Court below based his judgment to a great extent upon the view that the words "maintain and keep efficient," as used in s. 7 of the Education Act, 1902, with regard to a school, include the repair of the fabric of the school and school premises; but it is contended that the case of *Attorney-General* v. *West Riding of Yorkshire County Council* (1) shews that those words refer to the maintenance of the system of education carried on in the school, and not to that of the fabric.

[EARL OF HALSBURY. The point which arises in this case was not before the House of Lords in that case. The question there was whether the local education authority were bound to pay for denominational religious instruction in a non-provided school, and it was held that the words "maintain and keep efficient" included the maintenance of the scholastic system of education in the school.]

In *Morris* v. *Carnarvon County Council* (2) Phillimore J. seems to have thought that the words did not apply to the physical maintenance of the buildings. The term "maintain"

(1) [1907] A. C. 29. (2) Ante, p. 159.

as used in s. 7 cannot be read as applying to the fabric of the school, because in the case of non-provided schools the authority is to maintain the school "only so long as the following conditions and provisions are complied with," one of which is "(*d*) the managers of the school shall provide the schoolhouse free of any charge, except for the teacher's dwelling-house (if any) to the local education authority for use as a public elementary school, and shall, out of funds provided by them, keep the schoolhouse in good repair." It would be contrary to the rules of construction to give the word "maintain" in that section a different meaning as applicable to provided schools from that which it bears with regard to non-provided schools.

[EARL OF HALSBURY. The school board under the Elementary Education Act, 1870, must have been subject to the duty of keeping the schools provided by them in repair. Sect. 5 of the Act of 1902 provides for a transfer of the powers and duties of a school board to the local education authority.]

There is apparently no provision in express terms with regard to the "repair" of schools by school boards in the Elementary Education Acts. Sect. 5 of the Elementary Education Act, 1870, enacts that there shall be provided for every school district a sufficient amount of accommodation in public elementary schools. Sect. 18 of that Act provides in words similar to those of s. 7 of the Act of 1902 that "the school board shall maintain and keep efficient every school provided by such school board, and shall from time to time provide such additional school accommodation as is, in their opinion, necessary." Sect. 19 enacts that the school board, "for the purpose of providing sufficient public school accommodation," may "provide, by building or otherwise, schoolhouses properly fitted up, and improve, enlarge, and fit up" schoolhouses provided by them, and supply school apparatus and everything necessary for the efficiency of such schools. A definition of "schoolhouse" different from that of "school" is given by s. 3 of the Act, by which the playground is included in the term "schoolhouse," so that s. 18 does not appear to apply to the playground. There may be a liability in the county council to keep the school in repair as a public duty towards the community or the State; but it does not follow that there is a duty towards

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individual scholars so that the council would be responsible for the non-repair of this hole as a breach of a duty towards a scholar who is damaged thereby.

Thirdly, this case falls within the principle laid down in *Tozeland* v. *West Ham Union*. (1) The relation between the local education authority and the school children in this case is for the present purpose exactly analogous to that between the guardians and the paupers in that case. Farwell L.J. in that case said, in giving judgment (2), "Whatever may be the rights of third persons against guardians, the relation of the Local Government Board, the guardians and their officers, and the paupers to one another is regulated by statute in such a manner that the ordinary considerations arising out of the relation of principal and agent and master and servant have no application. The acts done by the guardians are all ministerial acts in performance of statutory duties to maintain and employ the paupers, for the due performance of which they are answerable to the Local Government Board: the guardians and their officers put the pauper to work, and the pauper works under statutory compulsion, not under any contractual relationship." So here, assuming that the local education authority might be liable to a member of the general public, not a scholar in the school, for the negligence of those in charge of the school, the authority has no duty towards the individual scholar for breach of which by its officers it is liable.

[FARWELL L.J. That case does not seem to me to have any application to the present. The question whether the guardians were liable there turned on the existence of the relation of master and servant. There was no suggestion of the existence of an express statutory duty.]

They also cited *Tobin* v. *Reg.* (3)

H. St. Gerrans and *Nolan*, for the plaintiff, were not called upon to argue.

EARL OF HALSBURY. In this case a point of law arises upon facts which I think raise no serious question of fact. The

(1) [1907] 1 K. B. 920. (2) [1907] 1 K. B. 933.
(3) (1864) 16 C. B. (N.S.) 310.

plaintiff undoubtedly was injured, and, upon the finding of the jury, which we are not disposed to disturb, his injury was caused by that which with proper care might have been avoided. A hole was allowed to exist in the asphalt paving of the playground, upon which it was intended that the schoolboys, of whom the plaintiff was one, should amuse themselves by running and otherwise; and it has been found by the tribunal whose function it is to determine questions of fact that the accident which occurred was due to negligence on the part of those whose duty it was to keep the playground, which formed part of the school premises, in proper condition. It seems to me obvious that any one charged with that duty was bound to take care that the playground where boys were expected to play, it being intended for the purposes of their recreation, should be in such a condition that they should not be exposed to unnecessary danger while playing there. With regard to the question of fact, it is enough, I think, to say that it seems to me impossible for any one seriously to contend, upon the evidence with regard to the nature of this hole in the pavement, that it was reasonable to leave such a hole in a place where boys were expected to play and run, so that the accident might obviously occur which has occurred in this case.

But the substantial question which arises in this case is one, not of fact, but of law. Assuming that somebody or other is responsible for the negligence which I have described, the question arises, who are the persons so responsible? I do not think that there is really any doubt about the answer to that question, for in my opinion it is determined by statute. The persons once responsible for maintaining the schools provided by them were the school board. The powers which were in the first instance conferred upon the school board are now transferred to the county council, and the duties which were originally imposed upon the former are now imposed upon the latter body, which is therefore responsible for the performance of all those duties. I object very much, in dealing with this case, to go beyond the exigency of the particular case. Other cases may depend on different circumstances, and upon the nature of the particular duties which may be alleged in those cases respectively to exist, whether by virtue of the common law or by statutory enactment.

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Earl of Halsbury.

With respect to this case, as I have said, I do not think there is any doubt. It does not appear to me to be really material to consider whether s. 7 or s. 5 of the Act is the section upon which the case depends. In my opinion, the words "maintain and keep efficient," as applied to a school, must necessarily include, not only what has been described as the "scholastic system" which is to be enforced, but also the place where the duty is to be performed by those who are under the main duty of keeping the school efficient for the scholars. Whatever may be necessary for the purpose of performing the main duty appears to me to be included in the general description of "keeping the school efficient." It is unnecessary to consider whether or not the word "maintain" in s. 7 would, of itself, as applicable to the matter with which we are at present dealing, namely, keeping the school efficient, have necessarily included all the rest, that is to say, keeping the school premises in a proper condition as regards health and comfort, and all that is involved in saying that they shall be so kept as to be a proper place for the reception of the children, as regards the school for the purpose of teaching and as regards the playground for the purpose of exercise and recreation. Without going through all the matters which are necessarily involved in maintaining and keeping efficient the school, it is enough for the purposes of this case to say that the duty which I have mentioned, and which was obviously formerly imposed upon and performed by the school board, has by the statute been imposed upon the county council. I decline to go beyond that, and, having come to that conclusion, it is unnecessary for me to consider the question whether, without s. 5, the word "maintain" as used in s. 7 would, necessarily and in itself, include the duty which is here in question, because s. 5 in my opinion clearly imposes that duty upon the county council. I therefore think that this action is well founded, and that it is brought against the persons who are by law made responsible as principals for the discharge of the statutory duty. I do not think it necessary to discuss the machinery provided by the statute with regard to the persons by whom the acts necessary for the performance of the statutory duty are to be actually performed. The body on whose behalf

these acts are to be done is the county council; the duty is upon them and is one for the non-performance of which they are in my opinion responsible. There may possibly be some question, as between themselves and some other body or persons, who are responsible, and as to the means to be taken to compel those persons to perform their duty more efficiently, but that is altogether beside the present question. For these reasons I think the appeal must be dismissed.

FLETCHER MOULTON L.J. I am of the same opinion and for the same reasons. Apart from s. 7 of the Act, s. 5 imposes upon the county council the duties which were formerly imposed upon the school board; and it cannot, I think, be seriously contested that those duties included the duty of keeping the schools which they provided in repair. That being so, there was a clear statutory duty; and, there being neglect of that statutory duty, a boy, who was a member of the public, was through that neglect injured. It was argued that the school children, for whom this playground was primarily intended, are for some reason excluded from the rights which ordinary members of the public would have in such a case. I can see no ground for that suggestion. They are not merely permitted or invited to come to the school, but directed to do so, and I think that, as members of the public, if they are injured by neglect of a statutory duty with regard to a place where they are expected to play, they are entitled to make those upon whom the statute has imposed the duty responsible for injuries sustained by them through breach of such duty.

FARWELL L.J. I agree. The Act has imposed upon the local education authority the statutory duty of maintaining and keeping efficient these schools. It is contended that the words of s. 7 of the Act cannot mean repairing the fabric of the school by reason of the condition with regard to non-provided schools contained in sub-s. 1 (*d*) of that section. It is not really material to consider this contention, because s. 18 of the Elementary Education Act, 1870, does not contain such a condition, and provides that the school board shall maintain and keep efficient all schools

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Farwell L.J.

provided by them; and by s. 5 of the Act of 1902 the duties formerly resting upon school boards are imposed upon the county council in future. Therefore I think that the county council have imposed upon them the statutory duty of keeping the school in repair, and that includes the playground.

The second point taken was that the body upon whom the responsibility for performance of this duty rested was not the county council, but the managers. That contention is not, in my opinion, correct. I think that the effect of s. 6 of the statute is to make the managers the statutory agents of the county council to keep the schools efficient, and the county council are responsible for the acts or defaults of their agents. It is impossible to read s. 6, although it provides that all the managers are not to be appointed by the county council, but some by another local authority, as meaning that the responsibility for the performance of the duty is to rest with the managers personally. Except as provided by the county council, they have no funds for meeting the expenses connected with such responsibility.

The decision in *Tozeland* v. *West Ham Union* (1) has, in my opinion, no bearing upon the present case.

Application dismissed.

Solicitor for plaintiff: *J. W. Barton.*
Solicitors for defendants: *Wyatt & Co.*

(1) [1907] 1 K. B. 920.

E. L.

TILLEY *v.* BOWMAN, LIMITED.

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Feb. 11.

Bankruptcy—Sale of Goods—Contract induced by Fraud of Purchaser—Vendor's Right to disaffirm Contract—Disaffirmance after Receiving Order against Purchaser—Title of Trustee in Bankruptcy—Mutual Dealings—Set-off—Damages for Fraud—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 38, 43, 44.

A sale of goods upon credit was induced by the fraud of the purchaser, who upon obtaining them pledged them with a pawnbroker. After the purchaser had paid part of the price a receiving order in bankruptcy was made against him. The vendor then discovered the fraud and disaffirmed the contract, retaking possession of the goods upon payment to the pawnbroker of the sum advanced upon them. The purchaser having been adjudicated bankrupt, his trustee in bankruptcy brought an action against the vendor, claiming (1.) to recover the goods or their value after giving credit for the sum paid to the pawnbroker to redeem them; or (2.) in the alternative to recover the amount paid to the vendor on account of the purchase price:—

Held, (1.) upon the authority of *In re Eastgate, Ex parte Ward*, [1905] 1 K. B. 465, that the trustee acquired the property in the goods subject to the right of the vendor to disaffirm the contract of sale and to retake possession of the goods; that the vendor had a right to disaffirm the contract after the date of the receiving order; and that therefore the trustee was not entitled to recover the goods or their value; and (2.), upon the authority of *Jack* v. *Kipping*, (1882) 9 Q. B. D. 113, that the vendor was entitled, under s. 38 of the Bankruptcy Act, 1883, to set off the damages caused by the fraud of the bankrupt, in this case the sum paid to the pawnbroker to redeem the goods, against the amount paid on account of the purchase price.

Action in the commercial list tried by Hamilton J. without a jury.

The plaintiff was the trustee in bankruptcy of George Edward Kirkness and Octavius Allen Kirkness, who carried on the business of retail jewellers under the style or firm of Kirkness & Sons, and the defendants were wholesale jewellers.

Upon November 14, 1907, Octavius A. Kirkness fraudulently represented to the defendants that the firm of Kirkness & Sons had a customer who wished to buy certain articles of jewellery and who wanted long credit, and by means of these representations he induced the defendants to sell to Kirkness & Sons a diamond brooch and six diamond rings for 569*l.*, and Kirkness & Sons gave bills of exchange for the price. On the same

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day Kirkness pledged the brooch and five of the rings with a pawnbroker for 300*l.* Kirkness & Sons paid to the defendants from time to time between January 3 and April 1, 1908, various sums, amounting in the whole to 182*l.* 11*s.* 11*d.*, on account of the bills given for the price of the brooch and rings. On May 5, 1908, a receiving order in bankruptcy was made against the firm of Kirkness & Sons, and they were afterwards adjudicated bankrupts, the plaintiff being appointed the trustee in bankruptcy. On May 21, 1908, the defendants, having after the date of the receiving order discovered the fraud of Kirkness and the fact that the jewellery had been pledged, elected to rescind the contract of sale, and on May 23, 1908, they paid to the pawnbroker with whom the jewellery had been pledged the sum of 300*l.* and obtained possession of the brooch and the five rings upon giving him an indemnity. Before action brought the plaintiff tendered to the defendants the sum of 300*l.* and demanded the delivery up of the brooch and the five rings, which the defendants refused. The value of the articles was agreed at 400*l.*

The plaintiff, in his points of claim, claimed the repayment of the sum of 182*l.* 11*s.* 11*d.* as money had and received by the defendants to the use of the plaintiff, being money paid by Kirkness & Sons to the defendants for which the consideration had failed; and in the alternative he claimed (*a*) a declaration that upon payment to the defendants of 300*l.* the plaintiff was entitled to delivery of the diamond brooch and the five diamond rings; (*b*) to recover the brooch and rings from the defendants or their value together with damages for their detention.

The defendants in their points of defence alleged that Kirkness & Sons were liable to them in damages for the fraudulent representations, such damages being the sum of 300*l.* paid by the defendants to redeem the goods, and they claimed the right to set off those damages against the sum of 182*l.* 11*s.* 11*d.*; in the alternative they counterclaimed for 300*l.* as damages for the fraud; and they denied the detention.

H. Dobb, for the plaintiff. With regard to the claim in detinue, the general property in the brooch and rings, subject to

the special property in the pawnbroker, was at the commencement of the bankruptcy vested in Kirkness & Sons, and under ss. 43 and 44 of the Bankruptcy Act, 1883, that general property passed to the plaintiff as the trustee in their bankruptcy. The property having passed to the plaintiff, it was too late after the receiving order for the defendants to disaffirm the contract of sale and retake possession of the articles. The plaintiff is therefore entitled to recover them from the defendants, or their value, after giving credit for the 300*l.* paid by the defendants to the pawnbroker to redeem them.

With regard to the alternative claim to recover the 182*l.* 11*s.* 11*d.*, it is not disputed on the part of the defendants that the plaintiff is entitled to that sum, but the defendants claim to set off against it the damages which they have suffered, namely, 300*l.*, from the fraud of Kirkness which induced the sale. No such set-off is allowable, as the damages do not arise out of any "mutual dealings" between the defendants and Kirkness & Sons within the meaning of s. 38 of the Bankruptcy Act, 1883. In order to come within the section the claim for damages must arise out of the contract of sale, and not from a mere personal tort: *Peat* v. *Jones* (1); *Jack* v. *Kipping* (2); *Palmer* v. *Day & Sons* (3); *In re Mid-Kent Fruit Factory.* (4) In the present case the claim for damages is a claim in respect of a personal tort antecedent to the contract. In *Jack* v. *Kipping* (2) the plaintiff sued upon the contract, which had never been disaffirmed by the defendant, and both parties relied upon it, and the Court accordingly held that the fraudulent misrepresentation which induced the contract was not a mere personal tort, but a breach of the obligation arising out of the contract. The defendant there who was defrauded did not elect to rescind the contract. The defendants here have disaffirmed the contract and thus put an end to it, and the effect is the same as if the contract had never existed; and the plaintiff's claim to recover the 182*l.* 11*s.* 11*d.* is a claim not under the original contract of sale in 1907, but under an implied obligation to repay the money which arose in 1908 when the defendants disaffirmed the contract,

(1) (1881) 8 Q. B. D. 147.
(2) 9 Q. B. D. 113.
(3) [1895] 2 Q. B. 618.
(4) [1896] 1 Ch. 567.

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and which only came into existence at that date. The right of set-off must be determined as at the date of the receiving order *Lord's Trustee* v. *Great Eastern Ry. Co.* (1), a decision which is not affected by the reversal of the judgment upon another point in the House of Lords. (2) At that date the contract had not been rescinded, and therefore the plaintiff had then a claim to recover the goods, and the defendants had a claim for damages for the fraudulent misrepresentations, and a claim for the return of goods cannot be set off against a money claim: *Eberle's Hotels and Restaurant Co.* v. *Jonas.* (3) The defendants, therefore, cannot set off the damages against the plaintiff's claim.

C. L. Attenborough, for the defendants. There having been a fraudulent misrepresentation which induced the contract of sale, the property in the goods sold passed to Kirkness & Sons subject to the right of the defendants to disaffirm the contract. Except in certain specified cases, the trustee in bankruptcy acquires no higher rights than the bankrupt had. The plaintiff as such trustee acquired the interest of the bankrupt in the goods subject to the rights of third parties, one of those rights being the right of the defendants to disaffirm the contract and to retake possession of the goods: *In re Eastgate, Ex parte Ward.* (4) In other words the plaintiff acquired the property of the bankrupt in the goods subject to a liability to lose the goods upon the contract being disaffirmed. The defendants having disaffirmed the contract, the plaintiff cannot recover the goods or their value.

With regard to the defendants' claim to set off the 300*l.* damages against the plaintiff's claim for 182*l.* 11*s.* 11*d.*, it would be inequitable to give judgment for the plaintiff for that sum and to leave the defendants to prove against the bankrupt's estate for the 300*l.*: *Jack* v. *Kipping.* (5) The facts in the present case are for all purposes the same as in *Jack* v. *Kipping* (6), where it was held that a claim for unliquidated damages for a fraudulent representation made by a bankrupt on the sale of a chattel is within the mutual dealings

(1) [1908] 2 K. B. 54.
(2) [1909] A. C. 109.
(3) (1887) 18 Q. B. D. 459.
(4) [1905] 1 K. B. 465.
(5) 9 Q. B. D. 113, at pp. 116, 117.
(6) 9 Q. B. D. 113.

section of the Bankruptcy Act, and therefore may be set off against a claim by the trustee in bankruptcy for the unpaid price, such fraudulent representation being a breach of the obligation arising out of the contract of sale. That case was recognized as good law in *Palmer* v. *Day & Sons*. (1) The plaintiff here is suing for the 182*l*. 11*s*. 11*d*. as money paid under the contract, and the defendants' claim for damages arises out of the contract in the sense stated in *Jack* v. *Kipping*. (2) The defendants therefore have a right to set off the 300*l*. against the plaintiff's claim.

H. Dobb in reply. In *In re Eastgate, Ex parte Ward* (3) the contract of sale was rescinded before the receiving order was made, and that distinguishes that case from the present one.

HAMILTON J. On November 14, 1907, Octavius A. Kirkness by false representations induced the defendants to sell and deliver to the firm of Kirkness & Sons on credit a diamond brooch and six diamond rings at the price of 569*l*. Kirkness on the same day pledged the brooch and five of the rings with a pawnbroker for 300*l*. From time to time the defendants succeeded in obtaining from Kirkness & Sons various sums on account of the price of the goods down to April 1, 1908, when the total of the sums so received amounted to 182*l*. 11*s*. 11*d*. At the beginning of May, 1908, a receiving order was made against the firm of Kirkness & Sons, and shortly after that the defendants discovered that the brooch and rings which they had sold to Kirkness & Sons had been pledged, and upon making further inquiries they ascertained the full facts. They thereupon, upon May 21, 1908, elected to rescind the contract of sale as having been induced by fraud. In my opinion they were entitled to do so. It is admitted that the contract was induced by the fraud of Kirkness, and it was therefore voidable at the option of the defendants. In order to redeem the brooch and the five rings which had been pledged the defendants were obliged to pay the sum of 300*l*. to the pawnbroker. The plaintiff, who is the trustee in bankruptcy of the two partners who constituted

(1) [1895] 2 Q. B. 618. (2) 9 Q. B. D. 113.
(3) [1905] 1 K. B. 465.

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the firm of Kirkness & Sons, claims first of all in detinue for the return of the brooch and five rings, or 400*l.* their agreed value, being willing to give credit for the 300*l.*, and in the alternative he claims to be repaid the sum of 182*l.* 11*s.* 11*d.*, which Kirkness & Sons paid to the defendants on account of the price. It is contended on his behalf that at the date of the receiving order the general property in the articles subject to the right of the pawnbroker was in Kirkness & Sons, that that general property vested in the plaintiff as their trustee in bankruptcy, and that the title of the plaintiff could not be devested by any subsequent act of the defendants. The right of the trustee is stated by Bigham J. in *In re Eastgate, Ex parte Ward* (1) in these words: "The trustee acquired the interest of the bankrupt in the property subject to the rights of third parties. One of those rights in this case was the right of the vendors of the goods to disaffirm the contract and to retake possession of the goods." That case, in my judgment, concludes the present one, unless it can be distinguished upon the ground that there the vendor rescinded the contract after the act of bankruptcy but before the receiving order was made against the purchaser, whereas here the defendants rescinded the contract after the receiving order had been made. To my mind that is not a distinction which makes that case inapplicable to the present one. By ss. 43 and 44 of the Bankruptcy Act, 1883, the artificial relation back of the trustee's title to the act of bankruptcy upon which the receiving order is made, or, if there are more acts of bankruptcy than one, to the first act of bankruptcy committed within three months preceding the presentation of the bankruptcy petition, is the same in either case, and the principle upon which that case was decided, namely, that the trustee acquired the bankrupt's interest in the property subject to the vendor's right to disaffirm the contract, is a qualification of the trustee's right equally applicable where the rescission is after the receiving order as where it is after the act of bankruptcy and before the receiving order. The claim in detinue therefore fails.

With regard to the alternative claim for the repayment of the 182*l.* 11*s.* 11*d.* the contention of the plaintiff is that as soon

(1) [1905] 1 K. B. 465, at p. 467.

as the contract was rescinded the money, which was paid under the contract upon the footing that it was in existence, can be recovered as money had and received by the defendants to the use of Kirkness & Sons, whose rights the plaintiff has now acquired. That proposition is not disputed, but it is said that the defendants are entitled, under s. 38 of the Bankruptcy Act, 1883, to set off against that sum the damages, which are now liquidated at 300*l.*, caused by the fraud of Kirkness, so as to extinguish the claim for 182*l.* 11*s.* 11*d.* Upon this question it seems to me that the decision in *Jack* v. *Kipping* (1) is in point and governs the present case. That case, upon its facts, is only distinguishable from the present in this, that there the contract of sale was not rescinded, whereas here it was. It is clear from *In re Daintrey, Ex parte Mant* (2), and *Lord's Trustee* v. *Great Eastern Ry. Co.* (3), that the question whether or not there is a right of set-off, as distinguished from the ascertainment of the amount of the set-off, must be settled once for all at the date of the receiving order, and it appears to me that the suggested distinction between *Jack* v. *Kipping* (1) and the present case is not a real one. At the date of the receiving order the defendants had a right, owing to the fraud of Kirkness, to rescind the contract of sale and to claim the return of the goods; and the goods were then in such a position that possession of them could only be retaken upon payment of 300*l.* If the defendants had known the full facts of their position at the date of the receiving order, they would have known that they could have rescinded the contract and claimed the return of the goods upon paying the 300*l.* Therefore at the material date the true position of the parties was that there was a contract still unrescinded on the one hand, and there was a right to claim damages for the fraud which brought about the contract on the other hand. I think that the contention on the part of the defendants is correct, namely, that the money claimed by the plaintiff is money previously paid under the contract, and that therefore the position, as viewed at the date of the receiving order, was this: that, if the right to rescind the contract was

(1) 9 Q. B. D. 113. (2) [1900] 1 Q. B. 546.
(3) [1908] 2 K. B. 54.

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exercised, the plaintiff would have a claim to recover the money paid under the contract, and the defendants would have a claim for 300*l.* for damages for the fraud which induced the contract. The facts therefore are substantially the same as those in *Jack* v. *Kipping* (1), and, though the reasoning in that case seems to me to give rise to some difficulty, still, inasmuch as the facts are the same in both cases, that decision binds me.

It is said, however, on behalf of the plaintiff that the claim by the defendants is a claim for damages for a personal tort, and that, therefore, as the claim of the defendants for damages does not arise out of the contract, but out of the personal tort of Kirkness, those damages cannot be set off under s. 38 of the Bankruptcy Act, 1883, against the claim of the plaintiff under the contract; and in support of that contention the language of Lord Russell of Killowen, when delivering the judgment of the Divisional Court in *Palmer* v. *Day & Sons* (2), which was cited by Vaughan Williams J. in *In re Mid-Kent Fruit Factory* (3), was relied upon. "The section," says Lord Russell of Killowen, "in its present shape, however, has been held applicable to all demands provable in bankruptcy, and so to include claims as well in respect of debts as of damages, liquidated or unliquidated, provided they arise out of contract." In *In re Mid-Kent Fruit Factory* (3) Vaughan Williams J., after quoting the above passage, points out that Lord Russell of Killowen clearly limited the operation of s. 38 by the words "provided they arise out of contract," and he goes on to say: "Then it was suggested that a claim in respect of a tort also fell within the section; but I pointed out that it was clear from *Jack* v. *Kipping* (1) that a claim for damage for misrepresentation, which was in one sense a claim in respect of a tort, was only allowed to come within the mutual credit clause on the ground that, the claim of the trustee being for the price of goods, the misrepresentation which led to the purchase of the goods was a mutual dealing as between the purchaser and the bankrupt vendor." *Jack* v. *Kipping* (1), as understood in the light of that explanation, is an authority which binds me, and accordingly seems to

(1) 9 Q. B. D. 113. (2) [1895] 2 Q. B. 618, at p. 621.
(3) [1896] 1 Ch. 567, at p. 571.

me to conclude the present case. The defendants' claim for damages for the fraudulent misrepresentation, which is in one sense a claim in respect of a tort, may be allowed to come within the mutual dealings clause upon the ground that, the claim of the trustee being in the nature of a claim under the contract, the misrepresentation which led to the contract was a mutual dealing as between the vendors and the bankrupt purchasers.

It is said that this conclusion leads to the defendants being allowed to approbate and reprobate at the same time, by simultaneously putting an end to the contract, upon the ground that it was induced by fraud, and relying upon the existence of the contract which they put an end to. That difficulty, however, disappears if one bears in mind that for the purpose of applying s. 38 of the Bankruptcy Act, 1883, one must consider what was the position of the parties and what were their rights at the date of the receiving order, and if that date is looked at it becomes clear that the defendants are not approbating and reprobating, but are claiming that the fraud which was practised upon them in 1907, and gave rise to the claim for damages as upon a breach of an obligation "arising out of the contract," in the sense explained in *Jack* v. *Kipping* (1), can be set off under s. 38 against the claim of the plaintiff to recover the 182*l.* 11*s.* 11*d.* as money which Kirkness & Sons have paid under the contract.

The result is that in my opinion the set-off is rightly claimed, and the plaintiff is not entitled to recover anything upon his claim. The counter-claim must also be dismissed.

Judgment accordingly.

Solicitor for plaintiff: *Julius A. White.*

Solicitor for defendants: *Stanley J. Attenborough.*

(1) 9 Q. B. D. 113.

W. F. B.

C. A.
1910
March 23.

[IN THE COURT OF APPEAL.]

HEATON *v.* GOLDNEY.

Practice—Discovery—Interrogatories—Libel—Innuendo—Interrogatory as to Meaning in which Defendant used Words.

In an action of libel in which the statement of claim attributed by an innuendo certain meanings to the words complained of, the plaintiff sought to administer to the defendant interrogatories, asking, in substance, whether the defendant intended by the use of those words the meanings attributed to them by the innuendo:—

Held, that such interrogatories were inadmissible.

Appeal from an order of Bucknill J. at chambers allowing certain interrogatories in an action for libel, as after mentioned.

The action was brought against the defendant Goldney, and also against P. D. Eastes & Co., Limited, who were the printers and publishers of a newspaper called the *Kentish Gazette and Canterbury Press*.

The statement of claim, after averring that since 1885 the plaintiff had represented the city of Canterbury in the House of Commons, and that for several years past the defendant Goldney had been desirous of securing the plaintiff's retirement, and of becoming the parliamentary representative of the said city, alleged that on or about October 23, 1909, the defendant Goldney caused the defendant company falsely and maliciously to print and publish of the plaintiff a letter written by the defendant Goldney which contained the words following: "I refuse to believe that you can really regard Mr. Heaton's (meaning the plaintiff's) former attempts to obtain a large sum of money from me as the price of his retirement as satisfactory evidence of his desire to set patriotism before his private interests." The statement of claim alleged by way of innuendo that by those words the defendants meant, and were understood to mean, that the plaintiff had corruptly attempted to obtain from the defendant Goldney a large sum of money in consideration of a promise by the plaintiff to retire from the parliamentary representation of the city of Canterbury in favour of the said defendant Goldney, that by such conduct the plaintiff had grossly abused his position

as a member of Parliament, and that he was wholly unfitted to represent the said city, and ought not therefore to be re-elected.

The defendant Goldney in his defence traversed the allegations of the statement of claim, and alternatively pleaded that, if he caused the words complained of to be printed or published, they were not capable of bearing, and he did not mean, and was not understood to mean, by them any of the meanings alleged in the statement of claim, or any defamatory meaning, and that they were, according to their natural and ordinary meaning, true in substance and in fact.

The plaintiff obtained from a Master leave to administer to the defendant Goldney the following interrogatory (among others):— "3. Did you not mean by such words that the plaintiff had corruptly attempted to obtain from you a large sum of money? Did you not also mean by such words that the plaintiff had attempted to obtain such sum in consideration of a promise by him to retire in your favour, or how otherwise, from the parliamentary representation of the city of Canterbury? Did you not also mean by such words that the plaintiff had abused his position as a member of Parliament? Did you not also mean that the plaintiff was unfitted to be elected or to remain a member of Parliament?"

The defendant appealed against the order of the Master allowing the above interrogatory to the judge at chambers, who varied the Master's order by allowing interrogatories in the following form:—"3. Did you not by such words intend to impute to the plaintiff that he had corruptly attempted to obtain from you a large sum of money in consideration of a promise by him to retire in your favour from the parliamentary representation of the city of Canterbury? 4. Did you not by such words intend to impute to the plaintiff that he had abused his position as a member of Parliament? 5. Did you not also intend to impute to the plaintiff that he was unfitted to be elected to, or to remain a member of, Parliament?"

G. Stuart Robertson, for the defendant Goldney. These interrogatories simply put the question whether the defendant by the words of the alleged libel meant what the innuendo suggests as

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their meaning. Such interrogatories are really unprecedented and cannot be justified by authority. It does not follow that an interrogatory is admissible because a question to the same effect might be put in cross-examination of the party interrogated at the trial. These interrogatories do not go to any question of fact other than the meaning of the libel. There being no plea of privilege in this case, no question of malice arises for the jury, but malice would be inferred as a matter of law from the libel. The question what the author of a written document meant by it cannot be a legitimate subject for interrogatories. The meaning depends upon the words of the document itself, interpreted according to their ordinary signification, or with reference to the surrounding circumstances, if there are any circumstances which may give them a special meaning. The really material question is what meaning they would bear to those reading them, not with what meaning the defendant used them: *Hulton & Co.* v. *Jones.* (1) In *Foster* v. *Perryman* (2), which may be relied upon for the plaintiff, the decision was with regard to particulars, not interrogatories. [He also cited *Wilton* v. *Brignell* (3); *Plymouth Mutual Co-operative and Industrial Society* v. *Traders Publishing Association.* (4)]

McCardie, for the plaintiff. It is submitted that, both on principle and on authority, such interrogatories as these are admissible. There will be, in this case, two distinct issues—first, whether in their ordinary meaning the words complained of are libellous; and, secondly, whether they bore the meanings alleged by the innuendo, in which case it would be clear that they were libellous. If the plaintiff fails to prove the innuendo, he fails upon the second issue. The object of interrogatories is to obviate the necessity for establishing matters which the party interrogated is not in a position to deny. If the defendant admits in answer to these interrogatories that he did mean by the libel what is alleged by the innuendo, his counsel could not well ask the jury to find that the libel did not bear that meaning. The intention with which words were used is in any case a material fact for the purpose of ascertaining their meaning,

(1) [1910] A. C. 20.
(2) (1891) 8 Times L. R. 115.
(3) [1875] W. N. 239.
(4) [1906] 1 K. B. 403.

and, therefore, one as to which an interrogatory is admissible. It is further submitted that these interrogatories are material as going to the question of malice and to the conduct of the defendant in the case, and therefore to amount of damages. *Foster* v. *Perryman* (1) is an authority in favour of the plaintiff's contention, although the subject-matter of the decision there was particulars and not interrogatories. [He also cited *Hennessy* v. *Wright* (2); *Capital and Counties Bank* v. *Henty* (3); *Getting* v. *Foss* (4); *Pearson* v. *Lemaitre* (5); *Millington* v. *Loring* (6); *Marriott* v. *Chamberlain*. (7)]

G. Stuart Robertson, for the defendant, was not called upon to reply.

VAUGHAN WILLIAMS L.J. In my judgment these interrogatories ought not to have been allowed. I think that, as altered by the learned judge, they are as much open to objection as they were in the form in which they were allowed by the Master. In substance they ask whether the defendant meant by the words complained of that which is alleged to have been their meaning by the innuendo. I do not think that these are questions which can properly be asked by way of interrogatory. So far as my own experience of the practice in relation to this matter is concerned, I may say that I have never before met with such interrogatories, and, if I had been asked before this case whether such interrogatories as to the meaning of the defendant in reference to the innuendo pleaded could be allowed, I should at once have answered in the negative. The case of *Foster* v. *Perryman* (1) has been cited to us. It does appear from the report of that case that Lord Coleridge C.J. and Mathew J. did there in effect order particulars to be given of the meaning in which the defendant intended to use the words in question. All I can say about that case is that it does not seem ever to have been followed, or to have found its way into the text-books on the subject; and it was not a decison which related to interrogatories.

(1) 8 Times L. R. 115.
(2) (1888) 24 Q. B. D. 445.
(3) (1882) 7 App. Cas. 741, at p. 744.
(4) (1827) 3 C. & P. 160.
(5) (1843) 5 Man. & G. 700.
(6) (1880) 6 Q. B. D. 190.
(7) (1886) 17 Q. B. D. 154.

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Vaughan Williams L.J.

In my opinion each of the grounds on which it is alleged that these interrogatories are admissible fails. I wish to point out, before dealing with those grounds, one thing which ought to be remembered with regard to interrogatories and discovery generally. Ever since they were first invented, it has been recognized that they constitute a process which might become oppressive, and be used for improper purposes; and therefore that the allowance or disallowance of interrogatories is a matter for the discretion of the judge, and they should be allowed or disallowed on the merits of the particular case. The practical result appears to have been that during all the length of time since the passing of the Judicature Act, and before that, when the Common Law Procedure Acts were in force, there is no case to be found in the reports in which such interrogatories as these have been allowed. It was argued that they ought to be allowed because they would go to prove malice. But in an ordinary action of libel, where there is no question of a privileged occasion, no question of actual malice arises, malice being implied from the defamatory words themselves. It is only where the words complained of were spoken on a privileged occasion that the question whether there was express malice becomes a material issue, and malice must be proved as a fact. But then it is said that these interrogatories go to the question of amount of damages, or that they relate to matters which might tell against the party answering them, as shewing what his conduct had been in relation to the case, or, in other words, which would be good ground for cross-examination of him. I do not think that either of those considerations affords any sufficient ground for allowing these interrogatories. I have looked through the report of the case of *Marriott* v. *Chamberlain* (1), which was cited to us, and I cannot find anything there which justifies the plaintiff's contention in the present case. For these reasons I think that the appeal must be allowed, and these interrogatories must be disallowed.

FARWELL L.J. I agree, and only desire to add one word of cordial assent to what Vaughan Williams L.J. has said as to the

(1) 17 Q. B. D. 154.

possibility of the process by way of interrogatories being made use of so as to be oppressive, as was sometimes the case in the Court of Chancery when all the statements of the bill in equity, without any selection, were converted into a series of interrogatories to be answered by the defendant.

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Appeal allowed.

Solicitors for plaintiff: *Lewis & Lewis.*
Solicitors for defendant: *Twisden & Co.*

E. L.

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Jan. 14, 17.

Ship—Charterparty—Bill of Lading—Exemptions from Liability—"Without prejudice to this charterparty"—Charterer Indorsee of Bill of Lading—Mutual Rights and Liabilities of Charterer and Shipowner.

A charterparty provided that a ship should proceed to a port of loading, load a cargo of lawful merchandise, and therewith proceed to a port of discharge for a lump sum freight; the captain was to sign bills of lading at any rate of freight without prejudice to the charterparty, but not below the charterparty rate; in certain events, which happened, the charterparty was to constitute the shipowner's authority to the charterers' agent to sign bills of lading in the captain's name; in the event of receivers of cargo withholding payment of bill of lading freight, the amount so withheld was to be deemed to have been deducted from the lump sum freight and not from any portion of the freight belonging to the charterers, and the accounts between shipowners and charterers were to be adjusted accordingly, and the shipowners were to take any steps necessary to enforce payment by the receivers of cargo of the amount so withheld; the captain and the shipowners were to have a lien on cargo by bill of lading for freight; and the charterers' liability was to cease on shipment of cargo provided the same was worth the lump sum freight.

The ship having arrived at the port of loading was put up as a general ship. A certain shipper shipped a cargo of dates and received a bill of lading signed in accordance with the terms of the charterparty by the charterers' agents at that port. The bill of lading contained exceptions from liability which were not those contained in the charterparty. While the ship was on her way to the port of discharge the charterers by their agents made an advance to the shipper, and the bill of lading was indorsed to them as security for the advance. At the port of

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discharge the charterers presented the bill of lading and received the dates, which were found to be damaged.

The charterers claimed to deduct from the lump sum freight a sum equal to the depreciation in value of the goods by reason of the damage:—

Held that, as the goods were not shipped by the charterers themselves under the charterparty, the bill of lading and not the charterparty contained the terms of carriage; that in these circumstances the bill of lading did not prejudice the charterparty; and consequently that, assuming the goods to have been damaged by causes for which the bill of lading as distinguished from the charterparty exempted the shipowners from liability, the charterers were liable to pay the lump sum freight in full.

TRIAL of action before Hamilton J. without a jury.

The action was brought by the plaintiffs, owners of the steamship *Calcutta*, against the defendants, who were charterers of the ship, to recover a sum of 236*l.* 13*s.* 6*d.*, balance of a lump sum freight alleged to be due under the charterparty.

The charterparty was dated London, October 23, 1908, and contained clauses to the following effect:—

1. It was mutually agreed between the Steamship Calcutta Company, Limited, owners of the steamship or vessel called the *Calcutta*, then at Bombay, of the measurement and class therein mentioned, and A. Weir & Co. that the said ship, being tight, staunch, and strong and every way fitted for the voyage, should proceed to Busreh and there load, always afloat, as ordered, a cargo of lawful merchandise, and therewith proceed to a safe port in the United Kingdom or so near thereunto as she could safely get as ordered by charterers to discharge.

2. The steamer was to discharge, always afloat, agreeably to bills of lading at any wharf, river, berth or dock as ordered by charterers or their agents. The freight was to be a lump sum of 4200*l.* based on a guarantee by the owners that the steamer could load a dead weight cargo of 5600 tons over and above coals, stores, and provisions on board and be within Lloyd's rules, and that not less than 317,500 cubic feet grain space as per builders' plan would be placed at charterers' disposal for cargo; otherwise a pro rata reduction was to be made.

3. In the event of receivers of cargo withholding payment of bill of lading freight on account of short delivery or damage

claims, the amount so withheld was to be deemed to have been deducted from the aforesaid lump sum freight and not from any portion of the freight belonging to charterers, and the accounts between owners and charterers were to be adjusted accordingly, and the owners were to take any steps necessary to enforce payment by the receivers of the amount so withheld.

Clause 4 contained the following provision:—"The captain to sign bills of lading at any rate of freight without prejudice to this charterparty, but not below charterparty rate, but should charterers or their agents be unable to have or not have ready for signature all or any bills of lading at any port or ports by the time the ship is otherwise ready to sail, it is agreed that this charter shall constitute owners' authority for charterers' agents to sign in the captain's name all unsigned bills of lading in conformity with mate's receipts, which shall be granted in due course . . . ."

By clause 5 the captain and owners were to have a lien on cargo by bill of lading for freight, dead freight, and demurrage. By clause 12 the ship was to be addressed to charterers' agents (whom owners accepted as agents of the vessel) at ports of loading and discharge in consideration of the payments therein mentioned.

The charterparty contained in clause 17 a number of exceptions not material to this case. The clause concluded with the words "Charterers' liability to cease on shipment of cargo provided same is worth the freight."

The *Calcutta* sailed from Bombay under this charter and arrived at Busreh, where she was put up as a general ship. There she received on board 1031 boxes of dates shipped by one Jacob Noats under a bill of lading dated at Busreh on November 25, 1908, and containing the following provisions:—"Shipped, apparently in good order and condition, at Busreh by Jacob Noats on board the steamship *Calcutta* . . . . bound for London the under-mentioned goods with liberty, &c., J. N. 1031 cases dates stated as being marked and numbered as herein indicated, and to be carried and delivered (subject to the exceptions limitations and conditions hereinafter mentioned) in like order and condition from ship's tackles where ship's responsibility shall cease at the port of London or so near

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thereto as she may safely get unto order or to his or their assigns. Freight and primage for the said goods to be paid in cash on arrival, without deduction, at 15 shillings per ton of 20 cwts. or 40 cf. at steamer's option, and to be considered earned, ship or goods lost or not lost. Average payable according to York-Antwerp Rules, 1890 . . . ."

The bill of lading contained a number of exceptions, limitations, and conditions relieving the shipowners from liability and not included in the charterparty. The mate's receipts were to be evidence of the quantity and the condition in which goods were received by the shipowners from river steamer and craft.

This bill of lading, which was given in conformity with the mate's receipt, was signed by one Khedery, who was the defendants' agent at Busreh; it was signed for and on behalf of the master in pursuance of the authority conferred by clause 4 of the charterparty upon the charterers' agent to sign bills of lading in the captain's name.

On December 11, while the vessel was at sea in the Persian Gulf, Khedery on behalf of the defendants made an advance, or agreed that an advance should be made, to Noats. The advance took the form of a draft for 200*l.* drawn by Khedery upon the defendants in favour of Noats, which was handed to Noats, who indorsed and handed to Khedery as security for the advance the bill of lading relating to the boxes of dates. The defendants thus became pledgees of the dates. They subsequently made a further advance to Noats amounting to about 100*l.*

When the ship arrived in this country the bill of lading was presented by the defendants, who at that time occupied the position both of pledgees and also of agents of Noats for the sale of the dates for him on consignment. The goods were delivered under the bill of lading. They were then found not to be in good order and condition. The plaintiffs claimed the lump sum freight under the charterparty. The defendants admitted the claim subject to a counter-claim in which they claimed to deduct therefrom a sum of 236*l.* 13*s.* 6*d.* for damage alleged to have been done to the goods on the voyage. The plaintiffs adduced evidence to prove that the dates were not in fact in good order and condition when shipped, and that the damage was not

sustained on the voyage; alternatively they contended that the goods had been shipped under the bill of lading, and that by the exceptions therein they were exonerated from liability for damage, if any, sustained by the goods on the voyage. The defendants' evidence was directed to prove that the goods were shipped in good order and condition and that they had sustained damage on the voyage. They further contended that their rights were governed by the charterparty and not by the bill of lading, and consequently that the plaintiffs were not exonerated from liability.

In pursuance of leave obtained for that purpose the defendants delivered a pleading alleging that the vessel was unseaworthy in respect of the position in which the dates were stowed. Apart from that allegation it was admitted that, if the plaintiffs were entitled to rely on the terms of the bill of lading, the exceptions contained therein afforded an answer to the defendants' claim for damage to the dates. It was also admitted that, if the terms of carriage were those contained in the charterparty, the exceptions contained in that document afforded no answer to that claim.

The plaintiff's claim having been admitted, subject to the counter-claim, the case for the defendants (plaintiffs in the counter-claim) was heard first.

Scrutton, K.C., and *Mackinnon*, for the defendants. Assuming that the evidence of the defendants establishes that the goods were shipped in good order and condition, this case being between shipowners and charterers, the charterparty is the governing document by which their mutual rights and liabilities are defined. By clause 4 of that instrument the captain is to sign bills of lading at any rate of freight without prejudice to the charterparty but not below the charterparty rate, but should the charterers or their agents be unable to have or not have ready for signature all or any bills of lading at any port or ports by the time the ship is otherwise ready to sail, the charterparty is to constitute the shipowners' authority for the charterers' agents to sign in the captain's name all unsigned bills of lading in conformity with the mate's receipts.

The effect of that clause is that a bill of lading given under

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its provisions constitutes a contract of carriage between the charterers and the shipper. The actual shipment of the cargo is most probably the result of previous negotiations between the charterers and the shipper, and the bill of lading, even if signed by the captain, is, to the knowledge of the shipper, so signed by the captain as agent or servant of the charterers. In the present case the bill of lading was in fact signed by the charterers' agents, although it was expressed to be signed for and on behalf of the captain; the charterers were agents of the shipper for the sale of the cargo on consignment, and they made an advance on the cargo. These facts lead to one of two inferences: either the cargo, although nominally the cargo of the shipper, was in substance the cargo of the charterers, in which case the bill of lading is merely a receipt for the cargo, and its exceptions do not avail the shipowners—*Rodoconachi* v. *Milburn* (1); *Krüger* v. *Moel Tryvan Ship Co.* (2)—or, the cargo being in truth the cargo of the shipper, the bill of lading constitutes a contract of carriage between the shipper and the charterers, in which case the same result follows, namely, that the shipowners cannot rely on the exceptions, not being parties to the contract.

But assuming that Noats was the owner of the cargo and that the bill of lading constituted a contract of carriage between him and the shipowners, still the charterparty provided in clause 4 that bills of lading signed under its provisions were to be "without prejudice to this charterparty." These words have been held to mean that, whatever may be the terms of the bills of lading, the contract contained in the charterparty is not to be altered by them: *Hansen* v. *Harrold Brothers* (3); *Turner* v. *Haji Goolam Mahomed Azam.* (4) It follows that if the bill of lading, whether by indorsement or otherwise, comes into the hands of the charterers, they are entitled to say that as between themselves and the shipowners the bill of lading cannot alter the terms of the charterparty to their prejudice; that the case is the same for this purpose as if the charterers had loaded the cargo and the bill of lading had been given to them in the first

(1) (1886) 17 Q. B. D. 316; 18 Q. B. D. 67.
(2) [1907] A. C. 272.
(3) [1894] 1 Q. B. 612.
(4) [1904] A. C. 826.

instance; and that consequently the shipowners cannot be excused from liability by any exemption not appearing in the charterparty. They are therefore liable for the injury done to the goods.

Bailhache, K.C., and *Raeburn*, for the plaintiffs. The evidence points clearly to the conclusion that this cargo was damaged before ever it was put on board the ship. But assuming that it was damaged on the voyage from causes for which the bill of lading would, although the charterparty would not, excuse the shipowners from liability, first, it is clear from the terms of clause 3 of the charterparty that in a certain event the charterparty itself may be prejudiced by the bill of lading. That event is where the receivers of cargo, in the present case the defendants, withhold payment of the bill of lading freight, which to a certain extent they are withholding; in that case the shipowners are to take any steps necessary to enforce payment by the receivers of the amount so withheld. One step they could take would be to put in force the bill of lading.

But it is not necessary to urge that argument, because the bill of lading in the present case does not "prejudice the charterparty" when the true meaning of those words and the true inference from the facts in this case are understood. The relations between shipowners, charterers, and shippers respectively are to be determined as a question of fact upon the documents and circumstances of each particular case: *Samuel* v. *West Hartlepool Steam Navigation Co.* (1) In the present case there is no reason for drawing any other than the ordinary and natural inference, namely, that Noats was the shipper, that the cargo was his own cargo, that the bill of lading was signed, as it purports to be signed, for and on behalf of the captain, and that it constitutes the contract of carriage between Noats and the plaintiffs. If Noats had himself brought an action against the plaintiffs for damage to these goods he must by reason of the exceptions have failed to get relief. Upon indorsement of the bill of lading the indorsee, by virtue of the Bills of Lading Act, 1855 (18 & 19 Vict. c. 111), has transferred to him all such rights of suit and is subject to the same liabilities in respect of

(1) (1906) 11 Com. Cas. 115.

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the goods as if the contract contained in the bill of lading had been made with the indorsee himself. Then what difference does it make that in the present case the indorsees happen to be the charterers? None whatever. It is said that it makes a difference because by the terms of the charterparty any bills of lading given were to be "without prejudice to the charterparty," and that the bill of lading in this case prejudices this charterparty, in that it contains exemptions from liability which the charterparty does not.

This contention raises the second question, namely, what is the meaning of the words "without prejudice to this charterparty"? The words can only mean without prejudice to the rights and liabilities of the parties to the charterparty in respect of acts done under the charterparty. For example, the ship is hired under the charterparty at a certain freight; the bill of lading is not to prejudice the shipowner's right to recover from the charterer the charterparty freight: *Gledstanes* v. *Allen* (1); *Shand* v. *Sanderson* (2); *Krüger* v. *Moel Tryvan Ship Co.* (3) So when the goods are shipped under the charterparty the terms of the charterparty, and not those of the bills of lading, define the mutual rights of charterer and shipowner: *Hansen* v. *Harrold Brothers* (4); *Turner* v. *Haji Goolam Mahomed Azam.* (5)

But where, as in the present case, the goods are not shipped under the charterparty at all, but are shipped under the bill of lading alone, it cannot be said that the bill of lading prejudices the charterparty. The two instruments, as regards the acts done under them respectively, do not touch one another; the one deals with the hire of the use of the ship; the other deals with the carriage of the cargo. The mistake is in regarding what might have been done under the charterparty instead of what has been done in fact under it. The goods might have been shipped under it, in which case it would have been the controlling document; but they were not in fact shipped under it, and that makes all the difference. The bill of lading was therefore without prejudice to the charterparty. Further, it contained the

(1) (1852) 12 C. B. 202.
(2) (1859) 28 L. J. (Ex.) 278.
(3) [1907] A. C. 272.
(4) [1894] 1 Q. B. 612.
(5) [1904] A. C. 826.

terms on which the goods were carried; by those terms the plaintiffs as between themselves and the shipper were not liable for the damage; and by indorsement of the bill of lading to the charterers the latter are placed in the shoes of the shipper. It follows that as between the plaintiffs and the defendants the plaintiffs are not liable for the damage to the goods.

Scrutton, K.C., in reply. If the contract contained in this bill of lading had been made with the defendants themselves the bill of lading would merely have operated as a receipt for the goods and the charterparty would have been the governing document. By s. 1 of the Bills of Lading Act, 1855, the indorsee of a bill of lading is placed in the same position as if the contract in the bill of lading had been made with himself. It follows that as between the plaintiffs and the defendants the charterparty, and not the bill of lading, is the governing document.

HAMILTON J. This action is brought by the owners of the steamship *Calcutta* against the charterers to recover a sum of 236*l.* 13*s.* 6*d.*, a balance of freight alleged to be due under the charterparty. The defendants admit the claim subject to a counter-claim for an equal amount for damage to goods on board the ship, and they base their counter-claim either on an alleged breach of the charterparty or, alternatively, in tort independently of the terms of the contract of carriage. In answer to this counter-claim the plaintiffs allege that the damage, if any, was done to goods which had been shipped not under the charterparty but under a bill of lading originally given to one Jacob Noats, and containing a number of exceptions from liability, which exceptions, as the plaintiffs contend, afford a good answer to the counter-claim. Leave was given to the defendants to deliver a rejoinder to this defence, and the pleading delivered in pursuance of that leave alleges that the vessel was unseaworthy in respect of the position in which the goods were stowed. [The learned judge stated the facts set out above, and continued:—]

It was suggested in the first place by the defendants, the charterers, that the bill of lading constituted a contract of carriage between themselves and Noats, the shipper, and that the

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plaintiffs, the shipowners, were no parties to this contract. It is no doubt true that although transactions by charter and sub-charter, time charter and sub-time charter, and charterparty and bill of lading fall into a number of well-recognized types, yet in each particular case it is necessary for the judge, in the words of Walton J. in *Samuel* v. *West Hartlepool Steamship Co.* (1), to determine for himself, as a question of fact on the documents and circumstances of the case, whether the contract for the carriage of the cargo is made with the charterers or with the shipowners. In the present case I think it is quite clear that if the captain had been available he would himself have signed the bill of lading, and would have done so at the request of Khedery, the agent of the charterers, upon whose introduction Noats probably shipped his cargo after previous arrangement as to the terms of the contract of carriage subsequently embodied in the bill of lading which is the defendants' usual form. The charterparty is one of the ordinary type; no fact has been proved to lead me to any other than the ordinary inference to be drawn from the documents in the ordinary course of business; and I am satisfied that the signature of the bill of lading by Khedery, which was expressed to be for and on behalf of the master, had the same effect as if the master had signed it, and that it caused a contract to arise by way of bill of lading between the plaintiffs, who were the shipowners, and Noats, who was in fact the shipper of the goods.

That being so, the defendants' contention is this: The captain is to sign bills of lading at any rate of freight without prejudice to the charterparty; that is to say that if a bill of lading is created, and if they, the charterers, obtain a title under the bill of lading, their rights against the shipowners are not to be prejudiced thereby, but as between themselves and the shipowners the charterparty is to remain unprejudiced, and therefore in all questions as between them and the shipowners the charterparty, and not the bill of lading, is to be the document containing the terms by which the questions between them are to be settled.

By way of answer to that contention the plaintiffs raised a point on clause 3. They argued that, even if the plaintiffs'

(1) 11 Com. Cas. 115.

interpretation be the true meaning of clause 4, clause 3 limits the effect of clause 4 to this extent, namely, that the charterer and the terms of the charterparty may be prejudiced by the introduction of the terms of the bill of lading "in the event of the receivers of cargo," who are the defendants in the present case, "withholding payment of bill of lading freight on account of damage claims," for in that event clause 3 of the charterparty provides that "the owners shall take any steps necessary to enforce payment by the receivers of the amount so withheld."

Now I do not accede to this contention of the plaintiffs, because in my view the words of clause 3 "in the event of the receivers of cargo withholding payment of bill of lading freight on account of damage claims" do not apply to the case where the receivers of cargo are the charterers and where they decline to pay the charterparty freight irrespective of the question whether they are or are not entitled to withhold payment of the bill of lading freight. In my opinion the scope and intention of the clause is to prevent the shipowner at the port of discharge from allowing a third person's deductions on account of damage, in effect making those deductions himself from the portion of freight in excess of the lump sum charterparty freight, which would belong to the charterer, and paying himself the full lump sum freight while he leaves the whole burden of the damage to fall upon the charterer. It is a provision like the provision which is common in charterparties that the shipowner shall look to his lien for freight, and is intended to induce the shipowner to do his best to make the receiver of cargo pay the freight in full. If that endeavour does not succeed, then the provision that "the accounts between owners and charterers shall be adjusted accordingly" comes into operation.

It is, however, hardly necessary to refer to clause 3 of this charterparty, because in my view the contention of the defendants based upon clause 4 is not well founded. The charterparty provided that the captain should sign bills of lading at any rate of freight without prejudice to the charterparty; that is to say, it provided that he should at the request of the charterers sign bills of lading which, if given to the charterers for goods shipped by them, would while the goods

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remained in the hands of the charterers be merely receipts for the goods and evidence of their title to the goods while afloat, but which, if indorsed by them to some third person, would involve the shipowners in a liability to the indorsee upon the contract of carriage contained therein. When the charterparty provided that the captain should so sign bills of lading without prejudice to the charterparty the intention was that neither charterers nor shipowners should thereby be prejudiced in their mutual relations touching any acts done under the charterparty. But in the present case there never was any shipment of these goods by the charterers under the charterparty, neither did they acquire them under the charterparty. From the first the contract for the carriage of these goods was in the terms of the bill of lading given to Noats; and whatever title to the goods the charterers subsequently acquired, they acquired under and upon the terms of that bill of lading and not under the charterparty.

Under these circumstances it does not appear to me that the circumstance, that the charterers subsequently became interested in the goods, entitles them to claim any benefit in respect of the carriage of the goods from the terms of the charterparty as distinct from the terms of the bill of lading. Whether they acquired a special property by lending money upon the bill of lading, or a general property by purchasing the goods or taking the indorsement of the bill of lading, it appears to me that in enforcing the terms of the bill of lading against them the charterparty is not being prejudiced, because the goods were not being carried on the terms of the charterparty, and the charterparty is only to be observed in respect of transactions to which it is, in effect, being applied by the parties. This point, which I think is more a question of fact than of law, and which is the point advanced by Mr. Bailhache on behalf of the shipowners, appears to me to be a sound one. I think that virtually the charterparty only applied to things done under it. It is the governing document, no doubt, as regards things done under it when the charterparty and the bill of lading are both granted in the first instance to the charterer, but in a case like this, where no part of the shipment or actual carriage is under the charterparty, it

does not appear to me that the terms of the charterparty apply to the transaction at all.

It appears, furthermore—and reference has been made to the words of Lord Selborne in *Sewell* v. *Burdick* (1)—that when the defendants demanded delivery of the goods under the bill of lading at the end of the voyage they did so upon production of the bill of lading and as parties interested by virtue of it, and thereupon, under the Bills of Lading Act, 1855, the contract expressed or evidenced by the bill of lading would become binding upon them as between themselves and the shipowner, although down to that point, if, as in *Sewell* v. *Burdick* (2), the shipowner had sought to make them liable under the bill of lading, they would have been entitled to say that the mere indorsement had not passed such a property to them as made them liable for freight or charges payable by the original shippers.

The result is that the counter-claim fails, because it is based on the allegation that the dates were dates whereof the defendants were owners, or, alternatively, pledgees, shipped under the charterparty; and in my opinion the allegation "shipped under the charterparty" is an essential averment in that pleading, and it is not proved in fact. (3)

There must therefore be judgment for the plaintiffs for 236*l.* 13*s.* 6*d.* on the claim, and judgment for the plaintiffs also on the counter-claim.

Judgment for the plaintiffs on claim and counter-claim.

Solicitors for plaintiffs: *Botterell & Roche.*

Solicitors for defendants: *W. A. Crump & Son.*

(1) (1884) 10 App. Cas. 74, at p. 86.

(2) 10 App. Cas. 74.

(3) The learned judge also held on the evidence that the defendants had failed to prove that the goods were damaged on the voyage and had also failed to prove that the vessel was unseaworthy. This part of the case, as it decided no point of law, has not been reported.

W. H. G.

C. A.
1910
Feb. 16.

[IN THE COURT OF APPEAL.]

HEWITT *v.* OWNERS OF SHIP DUCHESS.

Employer and Workman—Compensation—Accident—Accident arising out of and in Course of Employment—Evidence—Return to Sphere of Employment —Ship—Quay—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

The master of a small ship which was lying in Bangor Roads during a trading voyage from Liverpool to Penmaenmawr and back went on shore in the evening, went to a hotel near the quay for half an hour, then returned to the quay and hailed his ship to send a boat. Before the boat reached him he fell off the quay side and was drowned. There was no evidence as to whether he had gone to the hotel on his own business or on that of the ship, but it was proved that he had a perfect right to be on the quay, and might have been there in discharge of his duty to the ship. His widow claimed compensation under the Workmen's Compensation Act, 1906:—

Held, that the claimant had not discharged the burden laid upon her of proving that the accident arose out of and in the course of her husband's employment, and that she was not entitled to compensation.

Appeal from an award of the county court judge of Flintshire sitting as arbitrator upon a claim under the Workmen's Compensation Act, 1906.

The appellant was the widow of Hewitt, who had been captain of the steamship *Duchess*, of which the respondents were owners, and had been drowned on December 29, 1908, under the following circumstances. On December 28 the ship left Liverpool for Penmaenmawr to load stone. Owing to the weather she could not load, and went to Bangor Roads for the night. The next day she again went to Penmaenmawr, but the weather still prevented her loading, and she returned to Bangor Roads and again lay to for the night. The county court judge found on the facts that, by the terms of their employment, the captain and all hands had to find food for themselves; that they all expected to return to Liverpool the same day with their cargo of stones and were short of food at the end of the first day; that the captain and ship's crew were entitled to go on shore for food when the supply was exhausted;

and that when the ship was lying to the captain's duties might take him to the quay, and that he might be there as frequently as on the ship carrying out his duties to his employers. On the evening of December 29 the captain went on shore and went to the Union Hotel, about 100 yards from the quay, remained there about half an hour, and then returned to the quay. He hailed his ship for a boat, but could not at first make himself heard, and was on the quay for an hour. After the boat had started from the ship he by some means fell into the water and was drowned. Upon the evidence his going to the Union Hotel was equally consistent with his going there in the course of his employment or for his own pleasure. But the judge held that, though there might have been a deviation in going from the quay to the hotel, when he got back to the quay the deviation was at an end, and he had a right to be at the place where he actually was. He thought the case could not be distinguished from *Low* v. *General Steam Fishing Co., Ld.* (1), and he therefore found that the death of the deceased was due to an accident arising out of and in the course of his employment and awarded compensation to the widow.

J. R. Atkin, K.C., and *Stewart-Brown*, for the appellants. The respondent has not discharged the burden thrown upon her of proving that the accident occurred in the course of and arose out of the deceased's employment, for the judge has found that the evidence does not shew whether he went to the hotel on the ship's business or for his own pleasure. If the latter was the case he had not got back to the sphere of his duty until he was actually on the ship: *McDonald* v. *Owners of S.S. Banana* (2); *Moore* v. *Manchester Liners, Ld.* (3) Those cases were not doubted or overruled by *Low* v. *General Steam Fishing Co., Ld.* (4); the facts were distinguished.

R. Gething, for the respondent. The decision of the county court judge was correct. The quay was a place where the captain might well have been in the discharge of his duty. It was part of the contract with his owners that he should go ashore

(1) [1909] A. C. 523.
(2) [1908] 2 K. B. 926.
(3) [1909] 1 K. B. 417.
(4) [1909] A. C. 523.

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to get food, communicate with the owners, and other purposes. The judge was entitled to infer that he was there in the course of his duty: *Mackinnon* v. *Millar* (1); and the Court will not overrule such an inference unless it is an impossible one: *Rice* v. *Owners of Ship Swansea Vale.* (2) *Moore* v. *Manchester Liners, Ld.* (3) is distinguishable, because the man was a common sailor and had no possible duties outside the ship.

COZENS-HARDY M.R. This is a case in which the master of a small vessel fell off the quay side between ten and eleven o'clock at night. He had left his vessel, which was in the harbour or roads at Bangor, and gone to the Union Hotel, about 100 yards from the pier. He stayed there some time and came back to the pier, and, after shouting to the ship for some considerable time, he fell into the water before the boat arrived to take him on board. Now the learned judge who heard the evidence, which I do not propose to go through, says this: "In my opinion, upon the evidence, his going to the Union Hotel is equally consistent with his going there in the course of his duty or for his own pleasure. I am inclined to the former view, but the applicant, if the matter rested there, could hardly be said to have discharged the burden of proof which is cast upon her of proving affirmatively that the deceased went to the hotel for purposes connected with his duty as captain of the *Duchess*." It has been held by this Court repeatedly, and I think the view has been also upheld in the House of Lords, not merely that in this as in every other case the burden is upon the applicant to establish his case, but that he does not establish it if he simply proves a state of facts equally consistent with one of two alternatives, and if there is no circumstance which justifies the Court in drawing an inference. But the learned county court judge proceeded on this footing: Although I do not think that the applicant has discharged the burden of proof that the deceased went ashore for the purposes of the ship, yet, as he was back at the quay side when it happened, that was within the ambit of his duties. He therefore treats it as though it were a

(1) (1909) 46 Sc. L. R. 299. (2) (1910) 26 Times L. R. 276.
(3) [1909] 1 K. B. 417.

case governed by the authority in the House of Lords of *Low* v. *General Steam Fishing Co., Ld.* (1) Now to my mind that was a case entirely different from the present. That was a case where the deceased man had the duty of watching four trawlers and their moorings. His duty took him sometimes to watch upon one trawler and sometimes upon another, and sometimes on the quay side—in fact his duties of watching could be performed as efficiently on the quay as anywhere else; and the judgments of the majority of the noble Lords in that case really proceeded upon this footing: that in the case of that particular man the quay was the scene of his duty and of his operations precisely in the same way as the ship in Robertson's case, where we held that when the accident happened to a man who had been out probably for his own amusement but had got back to the ship, though in an improper way, and had fallen into the hold, the crucial point was his getting back on to the ship, and, the accident having happened there, the deviation, or whatever you choose to call it, was at an end. A case like that seems to me to have no bearing upon the present case. No doubt, for the purposes of his duties, the captain may have to go ashore and go on to the quay; he may have to go to the owners' agents or to the telegraph office, or to do a number of things on the ship's business; but that does not make the quay a part of the ambit or area of his duties any more than it would make the High Street a part of the ambit of those duties. That being so, if the case of *Low* v. *General Steam Fishing Co., Ld.* (1) is out of the way, it seems to me the decisions of this Court in the case of *Macdonald & Co.* v. *Owners of the Steamship Banana* (2), *Moore* v. *Manchester Liners, Ld.* (3), and *Robertson* v. *Allan Brothers & Co.* (4)—no one of which was in any way challenged or differed from in the House of Lords—binds us absolutely to say that the inference the learned judge drew, or the conclusion which he drew, that the man when he had got back to the quay must be taken as though he had got back to the ship, cannot be maintained in law, and that this appeal must be allowed and the application and award dismissed.

(1) [1909] A. C. 523.
(2) [1908] 2 K. B. 926.
(3) [1909] 1 K. B. 417.
(4) (1908) 98 L. T. 821.

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FLETCHER MOULTON L.J. In this case it is admitted that the captain had gone on shore lawfully. He had a perfect right during the course of his employment to go on shore on such occasions as the ship did not need his presence, but the applicant failed to shew that he went on shore on the ship's business. His duties, however, required him to return to the ship, and accordingly at half-past 10 at night, in the middle of winter, he went to the quay and shouted to the ship to order those on board to send a boat to take him out to the ship. Apparently they did not hear him for some considerable time, and at last, when they did hear him and sent the boat, he seems to have gone to the side of the quay, probably with the intention of getting into the boat when it arrived, and he fell into the water and was drowned.

In the case of continuous employment such as the employment of a sailor, where it is contemplated that during and in the course of his employment there will be periods of leisure which, when at sea, he spends on board the ship, but which when in port, with proper permission (or in the case of a captain whenever he thinks it right), he may spend on shore, there are two possible views: one is that if, when he has thus lawfully gone on shore, he succumbs in returning to his duty to one of the perils due to his occupation, the accident (which admittedly is in the course of his employment) arises out of it because it arises by reason of his duty to return to the ship when he has been lawfully absent. The other view is that the ship is the sole locus of his duties, and that, unless it can be shewn that he has gone on shore on the ship's business, he does not come within the purview of the Act, however much in fact the death or injury has been due to perils of the sea in getting from the shore to the ship.

In my opinion this Court has decided that the latter is the law. My own personal view, as shewn by my judgment in *Moore* v. *Manchester Liners, Ld.* (1), is very much the other way, but I must administer the law as laid down by this Court, and I have no doubt the decisions of the Court carry it thus far—that if a captain, who has been on shore lawfully, finds that his ship is in danger and is obliged to risk his life in getting to it in

(1) [1909] 1 K. B. 417.

order that he may save it, and that risk unfortunately ends in his being drowned, he is not drowned by an accident in the course of and arising out of his employment. I cannot myself see why we should say that it does not "arise out of" his employment, merely because he might have been sitting on the forecastle in his hours of leisure instead of doing an equally lawful thing, namely, going on shore. But this being the law as I understand it to be laid down by the last case of *Moore* v. *Manchester Liners, Ld.* (1), we have to apply it to this case. In my opinion this case is one in which, according to the decision of this Court, the accident did not arise out of the employment, and therefore the appeal must be allowed.

BUCKLEY L.J. The learned judge decided this case on the ground that it was not distinguishable from *Low* v. *General Steam Fishing Co., Ld.* (2) That is a proposition which involves that he held that the pier or quay on which the man lost his life was within the scene or sphere of his duty. The error into which he fell, I think, was that he assumed that the quay was within the scene or sphere of his duty, whereas it might have been and it might not; whether it was or was not depended upon the reasons for which he was present at that place. The learned county court judge had previously found upon the evidence, a finding which of course binds us, that the evidence as to his going to the Union Hotel was equally consistent with his having gone there in the course of his employment or for his own pleasure. If he had gone for his own pleasure, of course the pier or quay was not within the scene or sphere of his employment; if he had gone there on the ship's business, I daresay that it was. The learned judge assumed that, because the quay might have been within the scene of his employment, therefore he was entitled to say that the case was governed by *Low* v. *General Steam Fishing Co., Ld.* (2) That seems to me wrong. I think this appeal ought to be allowed with costs here and below.

Appeal allowed.

Solicitors: *Botterell & Roche, for J. R. Muspratt, Flint; Bower, Cotton & Bower, for Hughes & Hughes, Flint.*

(1) [1909] 1 K. B. 417. (2) [1909] A. C. 523.

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[RAILWAY AND CANAL COMMISSION.]

SPILLERS & BAKERS, LIMITED *v.* GREAT WESTERN RAILWAY COMPANY (ASSOCIATION OF PRIVATE OWNERS OF RAILWAY ROLLING STOCK, INTERVENERS).

Railway Company—Carriage of Goods—Right of Trader to provide Truck—Reduction of Rate where Company does not provide Truck—Railway and Canal Traffic Act, 1854 (17 & 18 *Vict. c.* 31), *ss.* 1, 2—*Great Western Railway Company* (*Rates and Charges*) *Order Confirmation Act*, 1891 (54 & 55 *Vict. c. ccxxii.*), *Sched. I., s.* 2 (*b*).

A railway company is under no legal obligation to convey on its railway trucks belonging to a trader at all times and in all circumstances, but if a railway company fails to provide sufficient trucks for the conveyance of the merchandise of a particular trader the trader may provide his own trucks, and in that case motive power for the haulage of the trader's trucks is a reasonable facility for the forwarding and delivering of traffic which the railway company must provide under s. 2 of the Railway and Canal Traffic Act, 1854.

By the schedule to the Great Western Railway Company (Rates and Charges) Order Confirmation Act, 1891, s. 2 (*b*), it is provided that in certain cases, where "the company do not provide trucks" in which merchandise is carried on the railway, the rate authorized for conveyance shall be reduced in the manner therein provided:—

Held, that this enactment does not apply to a case where, although the company is ready and willing to provide trucks, the trader prefers to, and does, use his own trucks, but only to a case where the trader uses his own trucks in order to supplement a deficiency in the supply of trucks by the company.

APPLICATION by Spillers & Bakers, Limited, to the Railway and Canal Commissioners sitting as arbitrators upon a difference between the applicants and the defendants, the Great Western Railway Company, under s. 2 (*b*) of the schedule to the Great Western Railway Company (Rates and Charges) Order Confirmation Act, 1891, and cross-application by the defendants.

The applicants were millowners carrying on a large business at Cardiff. Grain, flour, meal, and offals were conveyed from their mills over the defendants' railway and other railways, about 100 truck-loads a day being sent from the applicants' works. Previously to 1904 the applicants had made complaints

to the defendants that the number of wagons supplied by the defendants for the purpose of conveying the applicants' merchandise was insufficient. In October, 1904, the applicants decided to provide their own wagons, and they gave an order to a firm of wagon builders for the construction of wagons. These wagons when completed were used by the applicants on the defendants' railway (without prejudice to any claims the defendants might set up). At the date of the hearing the applicants had 300 of their own wagons in use, in addition to wagons belonging to the defendants. The applicants applied to the defendants for a reduction in the authorized rate for conveyance in respect of grain and other merchandise carried in the applicants' wagons, but the defendants refused to make any reduction, and the applicants, contending that a difference had arisen between them and the defendants under s. 2 of the schedule to the Great Western Railway Company (Rates and Charges) Order Confirmation Act, 1891 (1), applied to the Board

(1) Great Western Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 Vict. c. ccxxii.), Schedule, s. 2: "The maximum rate for conveyance is the maximum rate which the company may charge for the conveyance of merchandise by merchandise train; and, subject to the exceptions and provisions specified in this schedule, includes the provision of locomotive power and trucks by the company, and every other expense incidental to such conveyance not hereinafter provided for. Provided that—

"(*a*) The provision of trucks is not included in the maximum rates applicable to merchandise specified in class A of the classification, and the company shall not be required to provide trucks for the conveyance of such merchandise, or for the conveyance of lime in bulk or salt in bulk, or of the following articles when carried in such a manner as to injure the trucks of the company; that is to say, ammoniacal liquor, creosote, coal tar, gas tar, gas water, or gravel tarred for paving.

"(*b*) Where, for the conveyance of merchandise other than merchandise specified in class A of the classification, the company do not provide trucks, the rate authorised for conveyance shall be reduced by a sum, which, for distances not exceeding fifty miles, shall, in case of difference between the company and the person liable to pay the charge, be determined by an arbitrator to be appointed by the Board of Trade, and for distances exceeding fifty miles, shall be the charge authorised to be made by the company for the provision of trucks

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of Trade to appoint an arbitrator to determine the difference, and the Board of Trade appointed the Railway and Canal Commission to act as arbitrators.

The applicants accordingly applied to the Court to hear and determine the difference and to determine by what sums the rates for the conveyance of grain, flour, meal, and offals should be reduced in respect that the defendants did not provide trucks for the same.

The defendants by their answer alleged that they were able and willing to provide trucks for the whole of the applicants' merchandise, and they filed a cross-application under s. 10 of the Railway and Canal Traffic Act, 1888, asking for a declaration that the defendants were not bound to carry or convey the merchandise of the applicants in trucks provided by the applicants and that the rates charged or sought to be charged were legal.

The Association of Private Owners of Railway Rolling Stock obtained leave to intervene as parties interested.

When the case came on for hearing the Court was asked first to decide the question whether the words "rate authorized for conveyance" in s. 2 of the schedule to the Act of 1891 meant the actual rate in force, as the applicants contended, or the maximum rate which the defendants were authorized to charge. The Court decided this question in favour of the applicants' contention, and the decision was affirmed by the Court of Appeal. (1)

At the resumed hearing a large number of witnesses were called on both sides. The effect of the evidence is stated in the judgment. The Court came to the conclusion that it had been shewn that there had frequently been a deficiency in the supply by the defendants of covered vans.

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when not included in the maximum rate for conveyance."

Sect. 9 contained a scale of charges for the use of trucks provided by the company for the conveyance of merchandise when the provision of trucks was not included in the maximum rate for conveyance.

Sect. 23: "Where merchandise is conveyed in a trader's truck, the company shall not make any charge in respect of the return of the truck empty . . . ."

(1) See [1909] 1 K. B. 604.

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Bankes, K.C., and *R. Whitehead* (*Balfour Browne*, K.C., with them), for the applicants, and *Sir R. B. Finlay*, K.C., and *Bailhache*, K.C. (*Holman Gregory* with them), for the interveners. These applications raise two questions—first, as to the right of a trader to supply his own truck and to require a railway company to convey his merchandise in that truck; and, secondly, as to the right of the applicants, in the circumstances of this case, to have a reduction in the rate authorized for conveyance under the Great Western Railway Company (Rates and Charges) Order Confirmation Act, 1891. With regard to the first question, the early idea of a railway was that it was to be similar to a highway, on which the public might use their own trucks and carriages and locomotives on payment of tolls to the railway company, and that idea was perpetuated by the Railways Clauses Consolidation Act, 1845: see ss. 3, 76, 86, 92, 97, 98, 99, 108, 114, 117, 118, 120. The South Wales Railway Consolidation Act, 1855, which is the special Act regulating the part of the defendants' system in question, contains provisions pointing to the same conclusion. By s. 1 of the Railway and Canal Traffic Act, 1854, the word "traffic" is defined to include not only passengers and their luggage and goods, but also carriages, wagons, and trucks, and by s. 2 every railway company is to "afford all reasonable facilities for the receiving and forwarding and delivering" of traffic, so defined, and for the return of carriages and trucks. It is clear from these provisions that the Legislature by the Act of 1854 intended still to carry on the idea of the railway as a highway, although no doubt by that time the conveyance of traffic was mainly undertaken by the railway companies themselves in the capacity of carriers. In the Construction and Facilities Act, 1864 (27 & 28 Vict. c. 121), and in the Railway and Canal Traffic Act, 1873, ss. 3 and 14, the distinction between a charge for the use of the railway and a charge for the supply of a wagon or truck is made clear. By s. 25 of the Railway and Canal Traffic Act, 1888, the provisions of s. 2 of the Act of 1854 are re-enacted and extended to through traffic. Thus through the whole course of this legislation the right of a trader to use his own truck has been recognized, and for the purpose of enforcing that right a trader can obtain from this Court an order

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that the railway company shall afford him reasonable facilities for the forwarding and delivering of his trucks; that is to say, they must provide an engine to haul the trucks; and it is immaterial for this purpose to consider whether the railway company are ready and willing to carry the trader's merchandise in its own trucks. The Great Western Railway (Rates and Charges) Order Confirmation Act, 1891, does not in any way alter the previous legislation or deprive the trader of the rights obtained by him under that legislation. The Act of 1891 recognizes those rights as existing rights, as, for example, by providing by s. 6 of the schedule for the case of a truck kept on demurrage, and by s. 23 that traders' trucks when empty are to be returned without charge. In *Powell Duffryn Steam Coal Co.* v. *Taff Vale Ry. Co.* (1) the Court, while recognizing that s. 92 of the Railways Clauses Consolidation Act, 1845, confers upon private persons a statutory right to run their own engines and carriages on railways, held that that right could not be enforced by an injunction against a railway company, because the Court would not order the performance of continuous acts such as the working of the points and signals, without which the trader's engines could not use the railway. But although it was impossible for the Court of Chancery to grant the relief then asked for, this Court can give effect to so much of the Act of 1845 as is capable of being enforced by making an order requiring a railway company to provide reasonable facilities for the forwarding of the traffic, which in this case consists of trucks belonging to a trader and loaded with that trader's merchandise. The observations of Wills J. in *Hall* v. *London, Brighton, and South Coast Ry. Co.* (2) point to the same conclusion; and in *Harrison & Camm* v. *Midland Ry. Co.* (3) it was held in terms that under the Act of 1845 and the railway company's private Act of 1846 the trader had the right to have his goods carried in his own trucks. [They also referred to *Lancashire Brick and Terra Cotta Co.* v. *Lancashire and Yorkshire Ry. Co.* (4) and *Dickson* v. *Great Northern Ry. Co.* (5)]

(1) (1874) L. R. 9 Ch. 331.
(2) (1885) 15 Q. B. D. 505.
(3) (1893) 8 Ry. & Ca. Tr. Cas. 60.
(4) [1902] 1 K. B. 651.
(5) (1886) 18 Q. B. D. 176.

The second question turns on the words "where, for the conveyance of merchandise other than merchandise specified in class A of the classification, the company do not provide trucks" in s. 2 of the schedule to the Act of 1891. Class A contains minerals. Corn and flour are in class C. The Act provides by s. 2 of the schedule that the maximum rate shall include the provision of trucks and locomotive power except in the case of mineral traffic, which is always carried in private trucks, and certain other specified articles. The meaning of s. 2 (*b*) is that if in any other case merchandise is in fact carried in the trader's own trucks, then the rate authorized for conveyance is to be reduced in the manner provided. Since 1905 a part of the applicants' merchandise has in fact been carried in their own trucks, and they therefore come within the words of the section. Even if the defendants have, as they contend, been always ready and willing to provide the trucks for the whole of the applicants' merchandise, nevertheless, as in fact the applicants' own trucks have been used, they are entitled under s. 2 to a reduction in the rate.

Sir A. Cripps, K.C. (*Lush*, K.C., and *Harold Russell* with him), for the defendants. No inference as to a recognition of a statutory obligation on the railway company to convey the trader's own trucks can be drawn from the language of the Act of 1891, for that Act does not in any way deal with obligations, but merely provides a code of charges for services rendered, whether obligatory or not: *Midland Ry. Co.* v. *Myers, Rose & Co.* (1) There are two reasons why the applicants are not entitled to a reduction in the rate. In the first place, s. 2 (*b*) of the schedule to the Act of 1891 is not of general application, but applies only to those articles, other than merchandise in class A which are mentioned in s. 2 (*a*), and which the railway company are not bound to carry in their own trucks; and in the second place, even if s. 2 (*b*) has not that limited application, it only applies to cases where the railway company do not profess to provide trucks for some particular class of traffic. The section cannot mean that if at any time a trader chooses to load his goods in his own truck he is entitled to the reduction, although

(1) [1908] 2 K. B. 356; [1909] A. C. 13.

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the railway company is ready and willing to provide him with the necessary trucks for his business. On the other hand, if the company professes to supply trucks but fails to do so, the trader, though not entitled to a reduction in the rate under s. 2 (*b*), is not left without a remedy, for he would have a good cause of action against the company, and if he, supplying his own trucks, were charged the same rate as another trader who used the company's trucks, he could obtain redress in this Court on the ground of undue preference: *Watkinson* v. *Wrexham, Mold, and Connah's Quay Ry. Co.* (1); *Tharsis Sulphur and Copper Co.* v. *London and North Western Ry. Co.* (2) The present case is not one in which the company do not provide trucks within s. 2 (*b*). With regard to the general question, there is no statute which gives any member of the public a legal right to require a railway company to provide haulage for his truck. It is true historically that in the early days of railways the Legislature contemplated that they would be used in the same way as highways and canals were used and made provision for the payment of tolls accordingly, but in practice that idea very soon was seen to be unworkable, and the business of railway companies developed on the lines of the company itself being the carrier. Sect. 86 of the Act of 1845 authorized railway companies to act as carriers, but it placed no obligation on them to do so: *Johnson* v. *Midland Ry. Co.* (3) It is possible that when the Act of 1854 was passed the idea of the public using a railway on payment of tolls still lingered, but even if a railway company could be compelled, under the reasonable facilities provision, to provide engines to draw a trader's truck on the toll system, that would be of no advantage to the trader, because it would not give him the right to use the company's stations or signals, and it is not what the applicants are asking for in this case. The Act of 1891 deals with the defendants as carriers, not as toll-takers, and the position of a person entitled to use a highway on payment of a toll is entirely different from that of a person entitled to call upon a carrier to perform certain services. The Act of 1854 does not impose any legal obligation on the railway

(1) (1879) 3 Ry. & Ca. Tr. Cas. 164. (2) (1881) 3 Ry. & Ca. Tr. Cas. 455.
(3) (1849) 4 Ex. 367.

companies to act as carriers; it merely says that if a company professes to act as a carrier it must provide reasonable facilities: *South Eastern Ry. Co.* v. *Railway Commissioners*, per Lord Selborne (1); and that is the real ground of the decision in *Dickson* v. *Great Northern Ry. Co.* (2): see the observations of Wills J. in *Winsford Local Board* v. *Cheshire Lines Committee*. (3) The defendants do not profess to be, and are not, carriers of flour in traders' wagons, and they are, therefore, not bound to afford any facilities for traffic of that description. It would in fact be impossible for a railway company to carry on its business if any trader could at any time call upon the company to convey the trader's trucks and in addition to supply the company's trucks whenever wanted; and in determining the question of reasonable facilities the effect of the proposed order on the railway company is a matter for consideration: *Darlaston Local Board* v. *London and North Western Ry. Co.* (4) *Harrison & Camm* v. *Midland Ry. Co.* (5) is not in point, for the decision turned on a section in the special Act which clearly contemplated the conveyance of goods in trucks not belonging to the railway company.

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Bankes, K.C., in reply.

Cur. adv. vult.

1910. Feb. 23. A. T. LAWRENCE J. read the following judgment:—This is an application made under the Great Western Railway Company (Rates and Charges) Order Confirmation Act, 1891, s. 2 (*b*), by Messrs. Spillers & Bakers, of Cardiff, for an order determining by what sum rates for the conveyance of grain and flour should be reduced on the ground that the railway company does not, it is alleged, provide trucks for the same. The matter comes before the Court as arbitrators appointed by the Board of Trade under the powers of the above section. A cross-application has been filed by the Great Western Railway Company, seeking a declaration that the railway company is not bound to convey merchandise in trucks provided by the trader. The Association of

(1) (1881) 6 Q. B. D. 586, at p. 592.
(2) 18 Q. B. D. 176.
(3) (1890) 24 Q. B. D. 456.
(4) [1894] 2 Q. B. 694.
(5) 8 Ry. & Ca. Tr. Cas. 60.

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A. T. Lawrence J.

Private Owners of Railway Rolling Stock were allowed to intervene as parties interested. These applications were heard together.

The applicants are millers and corn merchants in a large way of business, having mills at Cardiff, Bristol, and other ports. Their mills and warehouses at Cardiff are situate upon the dock quay; they have no private sidings, and their commodities are loaded into trucks upon the running line of the dock railway. The Cardiff Railway Company, as owner of the dock lines, hauls the empty trucks from the Great Western sidings at Tyndall Street, about one mile distant, to the nearest available spot on the dock line; 60 to 100 trucks are required daily.

The first question that arises in considering these applications is, What are the obligations of the railway company in regard to conveying merchandise in traders' wagons? Merchandise traffic upon English railways may be divided into two classes, "mineral" and "goods." In general, minerals are conveyed in trucks provided by the trader; goods in trucks provided by the railway company. The capital invested in trucks, by traders in minerals on the one hand and by railway companies on the other, is enormous. During the argument of this case by the very able counsel appearing before us all the early statutes relating to railways were cited and considered. No general statute imposing an obligation on railway companies to haul the trucks of other persons was produced. Before 1854 railway statutes were framed with the idea that the company should provide a line of railway which was to be open to all on payment of certain tolls, like the then existing canals and turnpike roads. The company was also empowered to carry and convey goods on the railway, making reasonable charges not exceeding those authorized, and in no case incurring greater liability than that of common carriers. These Acts did not contemplate the railway company having any monopoly of the functions of carriers. In time it became apparent that it was more convenient for the railway company to provide the motive power, and (as shewn later by the case of *Powell Duffryn Steam Coal Co.* v. *Taff Vale Ry. Co.* (1)) this was found to be the only practical mode of

(1) L. R. 9 Ch. 331.

user; for they alone were in a position to man and work the necessary signals and points.

The Railway and Canal Traffic Act, 1854, accordingly made provision for this state of things. It did not cast an absolute duty on the railway company to provide motive power or to haul other persons' trucks at all times or under all circumstances. Any such enactment would, by itself, have been as impracticable as for every one to attempt to run his own train. What it did was to make the word "traffic" include truck or other suitable vehicle, and to impose upon the railway company the duty of affording all "reasonable facilities" for "receiving, forwarding, and delivering" the traffic of third persons. This is the only general statutory enactment of which I am aware, or to which our attention was called in the course of the case, applicable to this question.

It was argued that the toll or highway provisions of the Railways Clauses Consolidation Act, 1845, in some way gave a trader the right to have his truck upon the railway apart from the right of passage. This was put in another way by saying that the refusal to work the signals, &c., as in *Powell Duffryn Steam Coal Co.* v. *Taff Vale Ry. Co.* (1), made it incumbent on the railway company to haul the traffic themselves. If the Act of 1854 is excluded from consideration, I think these arguments are fallacious. The Act giving a right of passage over railways as highways remains unrepealed and has all the force it ever had. But it is simply unworkable, and the Legislature for good reasons has abstained from imposing such duties as would make it workable. Inasmuch as there was no duty imposed upon the company to work the signals and points and afford station accommodation to the trains of private owners, their refusal to do so was not wrongful, and no obligation arises from a person's refusing to do what he is under no duty to do. The case of *Harrison & Camm* v. *Midland Ry. Co.* (2) was relied upon as an authority establishing the right of a trader to have his goods hauled in his own wagons. That case was decided upon a special Act which gave the railway company power to make charges for conveyance, "whether in carriages belonging to the company or otherwise." It was held

(1) L. R. 9 Ch. 331. (2) 8 Ry. & Ca. Tr. Cas. 60.

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that the company could not make two charges, one for conveying the carriages and the other for conveying the goods in the carriages, and this although the trader was adopting a subtle method of getting new wagons delivered to the purchaser thereof. Wills J. said: "The owner of goods is under this section entitled to have his goods conveyed to his port of destination in any trucks on payment of the charges applicable to the particular class of goods sent." The whole force of that passage flows from the words "under this section." It seems to me no answer to this to say, as counsel did, that the company could have refused to take the goods. I do not think they could; but even if they could the company wanted to earn tolls. It had taken the goods, and the whole question the Court had before it was as to its power to make two charges for so doing. It was therefore quite accurate to say that "under this section" the trader "is entitled" to have his goods conveyed in any trucks on payment of the appropriate charges. It does not purport to be a decision on the general law or upon any other statute. It merely means that his liability for conveyance is the same under this section, whether his goods are conveyed in his own truck or in the company's truck.

Then it was said that the obligation in question arose by implication from the language of the Great Western Railway Company (Rates and Charges) Order Confirmation Act, 1891. This does contain clauses dealing with owners' trucks. Its short effect is to enact that where merchandise is conveyed in a trader's truck no charge shall be made for the return of the truck empty; to provide a maximum charge for each kind of accommodation and service; to make the rate for conveyance of minerals exclusive of the provision of the truck (these were, as I have said, in fact provided by the trader); to make the rate for conveyance of goods inclusive of the provision of the truck (these were in fact provided by the railway company). It enacts that when the truck for merchandise other than minerals is not provided by the railway company there shall be a reduction in the rate for conveyance. It was argued before us that these provisions imported a general statutory right, absolute in character, to have goods conveyed by the railway company in the trader's own truck.

This argument ignores the fact that there is a compulsion of self-interest apart altogether from statute, and that there are many possible cases in which it might suit the interest of the railway company to allow the trader to provide his own truck. In such cases it would be only just that there should be deducted from the rate that which as it stood it contained, namely, a charge for the use of a railway company's truck. The Act does not confine itself to providing for the charges to be made in cases where the company is bound to carry or to afford the particular accommodation. It is framed to provide a statutory maximum charge for accommodation and services of every sort within the scope of the company's undertaking, and this whether the accommodation or service is voluntary or obligatory. This, I think, is plain upon the face of the Act itself, but it has been placed beyond argument by the case of *Midland Ry. Co.* v. *Myers, Rose & Co.* (1) The company is by this Act prevented from charging any sum greater than the prescribed maximum for whatever service within the scope of its undertaking it may render. Beyond this limit to the amount it may charge, the company is left with its full liberty.

The result is to leave the matter before us to be determined under the Act of 1854, s. 2. In other words, we have to ask ourselves, is this a reasonable facility? To determine that we must have regard to all the facts and circumstances of the case, to the facts, not only as they affect the general public, but also as they affect the applicants and the railway company. If the matter were res nova and we were construing the Acts in the abstract, I should find no difficulty in saying that where a trader tenders a properly constructed, duly registered and loaded truck for conveyance the railway company is prima facie bound to forward it to its destination in due course; I do not think that, as a general rule, the railway company has anything to do with the ownership either of the truck or its contents. It was in this view of what was reasonable that the practice as to mineral traffic grew up. As a general rule minerals are conveyed in traders' trucks, and capital to the extent, we were told, of from fifteen to twenty million

(1) [1908] 2 K. B. 356; [1909] A. C. 13.

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pounds has been invested by traders in such trucks. In the case of general merchandise or goods, on the other hand, the practice has been different, for there the trucks are the property of the railway companies, and many millions of capital have been invested in providing an adequate supply of trucks for the purpose. This practice appears to have prevailed for many years, and railways, as they now exist, have been constructed with lines, sidings, and goods yards suited for dealing with the traffic upon this basis. It was clearly proved that if railway companies were required to carry their goods traffic as well as their mineral traffic in traders' trucks it would render these lines, sidings, and goods yards wholly inadequate. There is little or no surplus accommodation for the present traffic. The difference between the requirements of goods traffic when conducted in railway companies' trucks from those if the same traffic were conducted in owners' trucks would be very great. In the latter case, first the haulage of empties would be much greater; second, larger siding accommodation would be required en route; third, goods yards would require to be of greater area; fourth, the time occupied in shunting would be much greater. This is very apparent when the plans put in by Mr. Evans (1) and the evidence of the witnesses are carefully considered. The aim of traffic management is to minimize the empty haulage and to utilize trucks at the place of their discharge or at the nearest available spot. To this end each railway company has a department charged with attaining this object, and telegraph and telephone are in constant use to facilitate it. The trader's truck, when its load has been discharged, becomes an incumbrance to the railway, because it has to be hauled back empty to its place of origin without further payment. Next, economy in working depends largely upon the trucks in a train being fully loaded. This reaches its maximum when the railway company is entitled to add to the load of its truck whenever opportunity presents itself; it is at its minimum when the trader can load as much or as little as he pleases into his truck, and have his empty truck returned free. These considerations shew that if large traders carried their goods in their own trucks the result would be to

(1) A witness called on behalf of the defendants.

put railway companies to great expense, and thus increase the cost of carriage to the general public, for the expense of rendering the service is an acknowledged test of the propriety of the charge.

This railway company has 65,386 wagons, 10,174 of which are covered vans, the whole representing in value something like four-and-a-half million pounds invested in wagons to meet the requirements of traders. As the traders' wagons would displace the company's pro tanto, it is a serious innovation which the applicants seek to introduce.

It was urged by counsel for the applicants that the number of traders who would adopt the system would be small, but I do not understand upon what foundation the suggestion was made. If a trader can have his own wagons to meet his ordinary and regular demands, can reduce the conveyance rate as demanded by the applicants, can have his truck returned free, and can call upon the railway company to supply him with railway trucks whenever his needs exceed the normal, I see no reason to doubt that most large traders would adopt the plan. If, as I think is certain, this would result in largely increasing the cost of conveyance to all other persons, it should require a strong case to make the Court say it is a reasonable facility. That it is a reasonable facility in the case of mineral wagons and of commodities requiring some special kind of wagon is quite true. Speaking generally, our railway system has been developed on this footing. But corn and flour are ordinary commodities, and up to the time when this question arose between the parties had been satisfactorily carried in trucks provided by railway companies, which were generally sheeted wagons.

The next matter to be considered is what are the particular circumstances which are said to make it reasonable that the applicants should be afforded this unusual facility? They are, as I have said, very large traders. The traffic from their Cardiff mills fluctuates, but it generally requires nearly one hundred trucks per day, about sixty of which pass over the Great Western system. Their grievance divides itself under two heads—(1.) the short supply of vans; (2.) the supply of tainted or dirty trucks. No. 2 came to nothing. The correspondence shewed some complaints, but there were very few considering the largeness of

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the traffic, while the small amount of the claims from all causes shewed there was no substance in this head of complaint. No. 1 was of greater moment. It was proved that their demand for covered vans, as distinguished from sheeted wagons, had not been met. Their standing order was for sixty covered vans a day. There was frequently a deficiency in the supply. There were some occasions when there was a deficiency in the supply of any form of wagon, but this was not of frequent occurrence; it arose only when there was great extra pressure upon the railway. The use of vans instead of sheeted wagons for the carriage of flour and grain has come into vogue in the district in recent years. The Great Western and other railway companies have endeavoured to meet this by providing vans. The defendants have largely increased their supply of vans in the last few years in order to meet the demands of the applicants and other customers. But the applicants, not satisfied with the supply, in October, 1904, bethought them of buying their own vans. They inquired of the railway company what rebate they would be allowed on their own wagons. The company replied "None," because the saving to the company "would be counterbalanced by the increased cost of dealing with the returned empty wagons." The company did not take up the position for which they now contend before us, namely, that the applicants have no right to demand conveyance in their own vans. The applicants thereupon determined to purchase vans. Mr. Matthews (1), who gave his evidence extremely well, satisfied me that they did so in perfect good faith, believing they had the right to have their goods conveyed in their own vans whenever they pleased. I have no doubt he thought the question of rebate was open to dispute, but his construction of the clauses in the Act of 1891 made his scheme a very advantageous one, for with his own vans he could supply his normal wants or thereabouts, and could make the railway company provide for any casual needs in excess of the normal. He would, he thought, get a rebate which would pay for the vans and their upkeep, and he would have an excellent travelling advertisement, painting the name of his firm in letters as large as the van would

(1) The manager of the railway department of the applicants' business.

carry. There is one blot on his scheme which has not been much insisted upon, namely, that he has no sidings whereon to store his vans, so that whenever a van is not in actual use it must occupy the defendants' sidings or the dock line. This might be a minor matter were it not for the fact that his van must, whenever it is used, displace a Great Western van if, as the company assert, they are ready and willing to provide a proper supply for the traffic. The dispute between the parties, as to the adequacy of the supply, has been rather as to the adequacy of the van supply, and not as to the adequacy of the supply of sheeted wagons. Except in times of great stress such as occasionally arose (during the war, for example) there has been no shortage of sheeted wagons. There seems no reason to think that the sheeted wagon is not a suitable form of carriage for this class of traffic. Far the larger proportion of corn and flour is carried on English railways in sheeted wagons. In the north and east of England they are universally used, while the claims for damage are almost infinitesimal. The applicants, however, have a genuine preference for covered vans, which is shared by many of their customers in the Welsh valleys. Their rivals at Barry are well provided with vans. These facts create a real desire to have vans, though the superiority of vans over sheeted wagons is disputed. Upon the whole, I come to the conclusion that as the railway company did not, when applied to before the vans were bought, take up the position which it takes up now, and as the supply of railway vans is even now barely sufficient, I think the railway company is not entitled to an order declaring that the use by the applicants of these vans is not a reasonable facility under any circumstances.

I think the true position is that the trader may supplement by his own vans any deficiency of the railway company's vans. When under such circumstances—that is, when there is a shortage of railway vans—he asks to have his goods carried in his own vans, I think he is asking for a reasonable facility. To do this he would require a siding whereon to stable his vans, or he might arrange to pay for the use of a railway siding, under s. 7 of the Act of 1891. The quantum of payment would have to be agreed or determined by arbitration under that section. We

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have had no materials laid before us which would enable us to deal with it. With regard to the amount of the rebate to be made to the applicants when their van is used under the circumstances above mentioned the matter stands thus: Sect. 2 (*b*) of the Act of 1891 was probably framed to provide a rebate in the cases mentioned in (*a*), namely, where owners' wagons were used for lime, salt, and other deleterious commodities, but its language is not confined to these. It is wide enough to include any merchandise other than those in class A. Flour, &c., is therefore within the clause, and the trader is entitled to a rebate when this is carried in his own truck. The section says "where the company does not provide trucks." I do not think this means where the company is ready and willing to provide suitable trucks but the trader prefers to use his own. In such a case I think there would at the present day be no right to have flour trucks hauled—it is not a reasonable facility. On the other hand, in the case in which I hold it reasonable that the applicants should have the facility of using their own vans, namely, when the company is not able to provide them with sufficient vans, then they are entitled to have the charge for conveyance reduced.

The measure of the reduction is difficult to determine, but I think that under fifty miles it should be based upon the cost of providing and maintaining a van, assuming it to run the number of miles per annum that the average company's van runs, and giving it a life suitable to its construction. Over fifty miles the reduction is fixed by s. 9. I was not satisfied that these steel vans were given an adequate life by the evidence before us. It was put at twenty-five years, but it was admitted that this was not based upon any experience of steel vans. I think it would be more than twenty-five years. I think the parties should try and agree as to the amount of this reduction, and there will be liberty to apply in case it should be necessary. It may be that the parties will arrange, in view of this judgment, to adopt the offer of Sir Alfred Cripps, made on the last day of the hearing, and that the railway company will take over these 300 vans. Having regard to the fact that the applicants are good customers, and that

they bought these vans under a misapprehension as to their rights, it would be a graceful conclusion to the case. If this were done it would render it unnecessary to deal with the 569*l.* retained by the applicants, or the claim to rebate in respect of the user of these vans since 1906, for, these vans becoming the property of the railway company, these claims would be taken into account in the price to be agreed. If this suggestion is not adopted the parties must endeavour to agree upon these claims after considering this judgment. If they cannot agree, their respective views upon the subject can be heard, and there will be liberty to apply.

THE HON. A. E. GATHORNE-HARDY. I have had the opportunity of carefully considering the judgment which has just been delivered. I entirely agree both with its arguments and conclusions and have nothing to add.

SIR JAMES T. WOODHOUSE. These cases have raised issues of the greatest importance both to the public, the traders, and to the railway companies, and we have given them prolonged and careful consideration. I had written a separate judgment embodying my own views, but, having since had the advantage of reading the judgment just delivered by the learned judge, which deals so exhaustively and, if I may respectfully say so, so ably with all the points which it has been our duty to consider, I do not think it is necessary to say more than that I am completely in accord with the conclusions which that judgment expresses.

Solicitors for applicants: *Downing, Handcock, Middleton & Lewis, for Downing & Handcock, Cardiff.*

Solicitors for interveners: *Willis & Willis, for Taynton, Sons & Siveter, Gloucester.*

Solicitor for defendants: *L. B. Page.*

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HUMPHRIES *v.* HUMPHRIES.

Estoppel—Res Judicata—Landlord and Tenant—Agreement for Lease—Action for Rent—Defence, no concluded Agreement—Second Action—Defence, Statute of Frauds.

The plaintiff brought an action for arrears of rent alleged to be due under an agreement for a lease. The defendant relied on the defence that no agreement had been concluded, but did not raise any defence under s. 4 of the Statute of Frauds. Judgment was given for the plaintiff.

Further arrears of rent having accrued due, the plaintiff brought a second action. In this action the defendant raised the defence that there was no memorandum or note in writing of the agreement for the lease sufficient to satisfy the requirements of s. 4 of the Statute of Frauds:—

Held, that the defendant, not having raised this defence in the former action, was precluded from raising it in the second action.

Appeal from the county court of Worcestershire holden at Dudley.

Elizabeth Humphries, the plaintiff, was the owner of a dwelling-house and appurtenances known as Providence House and situate in Toll End Road, Tipton, in the county of Stafford. In August, 1907, she entered into negotiations with the defendant with a view to the latter taking a lease of the house and premises. On the defendant's instructions a draft agreement was prepared containing certain terms agreed upon between the parties. On October 29, 1907, a stamped document was handed by the defendant to the plaintiff which was alleged by the plaintiff to constitute an agreement by the defendant to take a lease of the house and premises for a term of fourteen years at a yearly rent of 36*l.* payable quarterly. The defendant, on the footing that no agreement had ever been concluded between the parties, abstained from entering into possession of the house and premises.

On July 16, 1908, the plaintiff issued a plaint in the Dudley County Court claiming the sum of 21*l.* 13*s.* alleged to be due for the rent of the house and premises under an agreement for a lease dated October 29, 1907. The claim was as to 18*l.* for half

a year's rent from December 25, 1907, to June 24, 1908, and as to 3*l.* 13*s.* for rent due on December 25, 1907. The defendant denied the existence of any concluded agreement for a lease. He did not either by notice before the hearing or by argument at the hearing raise any defence under s. 4 of the Statute of Frauds. The case was heard before the deputy county court judge, who held that the parties had come to an agreement, which, although only partly incorporated in the draft agreement, was fully known to and accepted by the defendant, and that, knowing the terms of that agreement, the defendant had agreed to accept without reservation the tenancy by the document of October 29, 1907. He accordingly gave judgment for the plaintiff for the amount claimed. The defendant appealed from that judgment, but the appeal was dismissed on the ground that the findings of the deputy county court judge were findings of fact which were supported by the evidence. The defendant subsequently paid the amount due under this judgment.

Rent again fell due which the defendant did not pay. On March 25, 1909, three quarters' rent at 9*l.* a quarter being due and unpaid, the plaintiff brought a second action in the Dudley County Court. In this second action, the particulars of claim being mutatis mutandis the same as those in the first action, the defendant gave notice of a special defence alleging that there was no memorandum or note in writing of the agreement for a lease sufficient to satisfy s. 4 of the Statute of Frauds. The case came on for hearing before the county court judge, who held the true inference from the documents and facts before him to be that the deputy judge had decided on the former hearing that the agreement for a lease dated October 29, 1907, mentioned in the particulars of claim was a valid and binding agreement; he therefore held that the matter was res judicata, and gave judgment for the plaintiff for the amount claimed.

The defendant appealed.

Maddocks, for the appellant. The basis of an estoppel by record or res judicata is that the issue in question has already been decided between the parties. The decision may be against one party in invitum, or it may be by direct admission, or by

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indirect admission, as where a traverse is taken upon other facts and found against the party making it: *Boileau* v. *Rutlin.* (1) The issue in question in the present action is whether there was any memorandum or note in writing of the agreement of October 29, 1907, sufficient to satisfy the requirements of s. 4 of the Statute of Frauds. That issue was not before the Court on the first trial. It was no part of the plaintiff's case on that trial. The issue between the parties on that occasion was whether or not there was an aggregatio mentium. The fact of the agreement and its validity was all that was decided in that action. Sect. 4 of the Statute of Frauds does not affect either the fact or the validity of a contract, but only makes a certain kind of proof necessary to enable a party to bring an action upon it: *Leroux* v. *Brown* (2); *In re Hoyle.* (3) The omission by a defendant to set up a defence in an earlier action does not estop him from setting it up in a later action brought by the same plaintiff, provided that such defence is not inconsistent with any traversable averment made by the plaintiff in the earlier action: Smith's Leading Cases, 11th ed., vol. 2, p. 763, notes to *Duchess of Kingston's Case; Howlett* v. *Tarte* (4); *Davis* v. *Hedges* (5); *Hindley* v. *Haslam.* (6) The absence of a memorandum in writing is quite consistent with the whole of the plaintiff's case in the earlier action. "Nobody ever heard," said Willes J. in *Howlett* v. *Tarte* (7), "of a defendant being precluded from setting up a defence in a second action because he did not avail himself of the opportunity of setting it up in the first action." A new cause of action upon the agreement of October 29 arises as each instalment of rent falls due: see *Sanders* v. *Coward.* (8) To a subsequent action any defence may be raised which was not raised in a former action. In *Irish Land Commission* v. *Ryan* (9) it was held that a judgment, in default of appearance, for arrears of tithe rent-charge did not estop the defendant from alleging in a subsequent action for further arrears that the rent-charge had been extinguished by the Real Property Limitation Act, 1833.

(1) (1848) 2 Ex. 665.
(2) (1852) 12 C. B. 801.
(3) [1893] 1 Ch. 84.
(4) (1861) 10 C. B. (N.S.) 813.
(5) (1871) L. R. 6 Q. B. 687.
(6) (1878) 3 Q. B. D. 481.
(7) 10 C. B. (N.S.) at p. 827.
(8) (1846) 15 M. & W. 48.
(9) [1900] 2 I. R. 565.

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Joy, for the respondent. The cases of *Howlett* v. *Tarte* (1) and *Irish Land Commission* v. *Ryan* (2) are distinguishable; in both cases the earlier judgment was a judgment by default. Here the issue before the county court on the former hearing was the existence of an enforceable agreement for a lease. That issue was found in favour of the respondent. That being so, the judgment of Blackburn J. in *Jewsbury* v. *Mummery* (3) is conclusive. That was an action against an executor upon a judgment against him after plea of plene administravit, the plaintiff suggesting a devastavit; the defendant sought to set up by way of defence facts which tended to shew that though there had been a wasting of the assets it had been with the consent and concurrence of the plaintiff. Blackburn J. said: "It cannot, I think, be contended that, if the defendant had an opportunity of relying upon these facts as a defence in the former action, he can now, having let such opportunity go by, set them up as a defence as negativing a devastavit." The doctrine of res judicata applies to all matters which existed at the time of the giving of the judgment, and which the party had an opportunity of bringing before the Court: *Newington* v. *Levy*. (4)

Maddocks, in reply. The cases of *Jewsbury* v. *Mummery* (3) and *Newington* v. *Levy* (4) are distinguishable from the present case. The former was an action on a judgment, which the present case is not. To understand the true bearing of that case it is necessary to bear in mind the nature of proceedings against an executor on a devastavit. When an action is brought against an executor in the first instance, if he pleads plene administravit and that issue is found against him, judgment is given against him in the action. On that judgment execution de bonis testatoris issues in the first instance. If the sheriff returns nulla bona or otherwise fails to satisfy the claim out of the testator's assets, the plaintiff applies for a writ of execution against the executor de bonis propriis, suggesting a devastavit: see Williams on Executors, 10th ed., vol. 2, p. 1598. That was the proceeding in *Jewsbury* v. *Mummery*. (3) Of course, in reply to that proceeding the defendant could not set up any matter which

(1) 10 C. B. (N.S.) 813.
(2) [1900] 2 I. R. 565.
(3) (1872) L. R. 8 C. P. 56.
(4) (1870) L. R. 6 C. P. 180.

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would have afforded a defence to the original action. In *Newington* v. *Levy* (1) the plaintiff, having been defeated in the first action, brought a second action in respect of the same claim. In the present case the claim in the second action was upon another and a different cause of action from that which was put in suit in the first action.

PHILLIMORE J. This appeal must be dismissed. The defendant contends that the county court judge ought to have given effect to his special plea under the Statute of Frauds; that it was new matter raised in the second action upon which there had been no adjudication in the first action; and that therefore the judgment in the former action was no estoppel.

As a matter of fact there is, in my opinion, no substance behind this special plea; however, we ought not to consider that, but to direct our minds to the question whether in principle this defence ought to have been adjudicated upon in the second action. I think the judgment of Blackburn J. in *Jewsbury* v. *Mummery* (2) answers that question. That learned judge said: "It cannot, I think, be contended that, if the defendant had an opportunity of relying upon these facts as a defence in the former action, he can now, having let such opportunity go by, set them up as a defence as negativing a devastavit. The rule of equity was held to be in this respect the same as that of law as long ago as Lord Hardwicke's time, in the case of *Ramsden* v. *Jackson*. (3) The simple question, therefore, is whether the defendant could have made use of these facts as a defence in the former action. It is clear that moneys forming part of the testator's estate came to the defendant's hands, and that the application of them was prima facie illegal as against the plaintiff; but the defendant seeks to shew, as a defence, that such misapplication was with the plaintiff's own consent. It appears to me that, if the facts the defendant now seeks to set up amount to a defence, he could have availed himself of it under the plea of plene administravit." It is admissible to plead in a second action new matter of fact not considered in a former

(1) L. R. 6 C. P. 180. (2) L. R. 8 C. P. 56.
(3) (1737) 1 Atk. 292.

action, for example a release, or an accord and satisfaction, which has not been expressly or impliedly under the cognizance of the Court in the former action. It may even be that a plea of the Statute of Limitations (21 Jac. 1, c. 16) is admissible in a second action, because that plea frequently introduces new facts into the discussion. It is not, however, necessary to say whether or not a plea under that statute would be admissible in a second action on some such grounds. The plea in question in this case is based upon s. 4 of the Statute of Frauds, and it is clear that a defence under that section introduces no new matter. It merely calls the attention of the Court to what is clear on the evidence, namely, that by want of a note or memorandum in writing there is no enforceable contract between the parties. It is true that by a rule of convenience that statute must be specially pleaded, or the Court will not take notice of it; but it does not on that account raise new matter. It must be specially pleaded in order that, if the plaintiff is in a position to rely upon a part performance of the contract, he may come to trial prepared with his evidence to prove that issue. In *Howlett* v. *Tarte* (1) Williams J. said: "I think it is quite clear upon the authorities to which our attention has been called, and upon principle, that, if the defendant attempted to put upon the record a plea which was inconsistent with any traversable allegation in the former declaration, there would be an estoppel." In the present case the particulars of claim in the first action alleged that a sum was due for rent of the dwelling-house under an agreement for a lease dated October 29, 1907. That was a traversable allegation, and the allegation was in fact traversed. This was not like the case of *Howlett* v. *Tarte* (1), a case where the former judgment went by default. The present is an a fortiori case for the plaintiff; but the judgment of Byles J. indicates what may be pleaded in a second action where judgment in the former action has gone by default. The learned judge said (2): "It is plain that there is no authority for saying that the defendant is precluded from setting up this defence. It was hard enough, in actions at common law, where the defendant could only plead one plea: but, to extend the rule to the case of

(1) 10 C. B. (N. S.) 813, at p. 826. (2) 10 C. B. (N. S.) at p. 827

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an allegation not upon the record would increase the hardship tenfold. Suppose an action of covenant: the defendant had two defences,—performance and release. He could not plead both: he elected to plead performance. Suppose that plea found against him. He could not in a subsequent action plead non est factum. But, what authority is there for saying that he could not plead the release?" That judgment indicates the principle that new matter, if consistent with a confession by the defendant of all findings necessary to warrant the judgment in the first case, may be raised in the second; but a plea which merely calls the attention of the Court to a conclusion or inference from facts proved in the former trial does not raise new matter within this principle, and cannot be admitted in the second trial. In the first action counsel for the plaintiff alleged that there was an enforceable agreement for a lease. It may be that the defendant did not avail himself of all the points he might have taken. He did not give notice of any special defence under the Statute of Frauds; but he had an opportunity of doing so, if he had been minded to raise the point. The agreement was found to be enforceable, and it is idle for the defendant to contend that at this stage he is at liberty to set up that defence. The appeal must be dismissed.

BUCKNILL J. I agree. I think that this is a very clear case. The deputy county court judge had to decide whether there was a binding agreement for a lease between the plaintiff and the defendant. Upon the facts before him he found that there was an agreement for a lease binding upon the defendant, and that the defendant was bound to pay the sum claimed in the first action. The defendant could have pleaded the Statute of Frauds; he knew that the document of October 28, 1907, was in existence. and could have pleaded that, admitting its existence, it was not sufficient to satisfy the requirements of the Statute of Frauds. That was a traversable issue which he did not choose to raise. Now in these circumstances I think the words of Blackburn J. in *Jewsbury* v. *Mummery* (1) conclude this case in favour of the plaintiff. "It cannot, I think, be contended," said that learned

(1 L. R. 8 C. P. 56, at p. 61.

judge, "that, if the defendant had an opportunity of relying upon these facts as a defence in the former action, he can now, having let such opportunity go by, set them up as a defence as negativing a devastavit." In the present case the particulars of claim in the second action were carefully modelled on those in the first action; and the county court judge has rightly held that the defendant, having had an opportunity of relying upon the Statute of Frauds as a defence in the former action, cannot now, having let that opportunity go by, set it up as a defence in the second action. I agree, therefore, that this appeal should be dismissed.

Appeal dismissed.

Leave to appeal refused.

Solicitors for appellant: *T. D. Jones & Co., for J. & L. Clark, West Bromwich.*

Solicitors for respondent: *Murr, Rusby & Archer, for Sharp & Darby, Dudley.*

W. H. G.

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Feb. 24;
March 15.

METROPOLITAN WATER BOARD *v.* LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY.

London—Water Rate—Domestic Purposes—Railway Purposes—Railway Station—Sanitary Conveniences—Metropolitan Water Board (Charges) Act, 1907 (7 *Edw.* 7, *c. clxxi.*), *ss.* 8, 16, 25.

The Metropolitan Water Board (Charges) Act, 1907, provides by s. 8 for a supply of water for "domestic purposes" at the request of the owner or occupier of any house or building occupied as a separate tenement within the limits of supply of the Metropolitan Water Board at a rate based on the rateable value of the house or building. The same Act by s. 16 provides for a supply of water by measure for "purposes other than domestic" at the request of any owner or occupier of any premises situate as therein described at rates varying with the quantity supplied. By s. 25 "domestic purposes" are deemed to include water closets and baths of a certain capacity, but are not to include a supply of water for "railway purposes."

A railway company owned a station situate as described in s. 16 and within the limits of supply of the Board. The station was separately rated; it contained no stationmaster's house, but contained waiting rooms, a porter's room, and a booking office; on the up and down platforms were urinals and two water closets, one for passengers and one for the staff; there was also on each platform a tap from which water was drawn for drinking and for cleansing the platform:—

Held by the Divisional Court (Phillimore and Bucknill JJ.), that water supplied by the Board for these purposes was not supplied for "domestic purposes" within the meaning of s. 8, but was supplied for "purposes other than domestic" within the meaning of s. 16 of the Act;

Per Bucknill J., that the water was used for "railway purposes" within the meaning of s. 25.

Appeal from the Westminster County Court.

The plaintiffs on March 31, 1909, brought an action in the county court to recover a sum of 12*l.*, the amount of four quarters' water rate alleged to be due from the defendants in respect of their West Norwood railway station.

The West Norwood railway station was separately rated at 300*l.* gross value and 240*l.* rateable value. In this station there was no stationmaster's house, but only the usual waiting rooms, porters' room, and booking office. On the up and down platforms were urinals for gentlemen and two water closets, one for passengers and the other for the use of the staff. There was also

on each platform a draw-off water tap from which was drawn water for cleansing the platform and whatever might be required for drinking.

The water supplied by the plaintiffs to the defendants was used by the latter for the urinals and water closets and for washing and drinking purposes, all in connection with the railway. Until the Metropolitan Water Board (Charges) Act, 1907, came into force, water supplied to this station for these purposes was always charged for by meter.

The plaintiffs contended that the water had been supplied to the defendants for "domestic purposes" within the meaning of s. 8 of the Metropolitan Water Board (Charges) Act, 1907 (1), and that consequently by the same section they were entitled to charge at a rate per annum not exceeding 5 per cent. of the rateable value of the building in respect of which the water was supplied.

The defendants paid into Court the sum of 8*l.* 9*s.* 2*d.* together with 18*s.* for costs in satisfaction of the claim. They contended that the water was supplied for "purposes other than domestic" within the meaning of s. 16 of the Metropolitan Water Board (Charges) Act, 1907, being supplied, as they alleged, for "railway purposes" within the meaning of s. 25 of that Act, and that they were liable as for a supply by measure and not otherwise.

It was admitted that if the water was supplied for "domestic purposes" within the meaning of s. 8 of the Act the plaintiffs were entitled to recover 12*l.*, but that if it was supplied for "purposes other than domestic" within the meaning of s. 16 of the Act the defendants were liable to pay 8*l.* 9*s.* 2*d.* and no more.

The county court judge held that the water was supplied for "purposes other than domestic" within the meaning of s. 16 of the Act and gave judgment for the defendants.

The plaintiffs appealed.

Danckwerts, K.C., and *A. B. Shaw*, for the appellants. The county court judge was wrong in holding that the water was supplied for purposes other than domestic. In considering whether water is supplied for domestic purposes the test is the character of the purpose for which, and not the character of the

(1) See note on p. 816, post.

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premises in which, the water is used: *South-West Suburban Water Co.* v. *St. Marylebone Union* (1); *South Suburban Gas Co.* v. *Metropolitan Water Board.* (2) The same principle underlies the cases of *Pidgeon* v. *Great Yarmouth Waterworks Co.* (3), where the water was supplied for the use of a boarding-house, and *Frederick* v. *Bognor Water Co.* (4), where it was supplied for the use of a boarding school. In *Barnard Castle Urban Council* v. *Wilson* (5), where the water was supplied to a charity school, it was held that in deciding whether it was supplied for domestic or other purposes regard was to be had to the ordinary habits of domestic life in this country and also to what can be reasonably considered a domestic purpose. The same principle applies to the cases relating to household refuse and trade refuse: *J. Lyons & Co.* v. *London Corporation* (6); refuse from things used in a dwelling-house does not become trade refuse because it is found in a restaurant, but remains household refuse. So water used for sanitary conveniences is still used for domestic purposes notwithstanding that the sanitary conveniences may be in a railway station.

[PHILLIMORE J. Would water supplied for flushing a public urinal be supplied for domestic purposes?]

Under this Act it might be taken to be supplied for "cleansing sewers and drains," or for "flushing drains by means of any apparatus discharging automatically" within the meaning of s. 25. But otherwise it would be supplied for domestic purposes.

Younger, *K.C.*, and *Clode*, for the respondents. In all the reported cases in which water has been held to be supplied for domestic purposes there has been a dwelling or domus in respect of which it has been supplied. This element is indicated as the test by Romer L.J. and Stirling L.J. in *Barnard Castle Urban Council* v. *Wilson*. (7) The same reason applies to water supplied to a workhouse: *Liskeard Union* v. *Liskeard Waterworks Co.* (8); *Chester Waterworks Co.* v. *Chester Union* (9); or to a boarding-

(1) [1904] 2 K. B. 174.
(2) [1909] 2 Ch. 666.
(3) [1902] 1 K. B. 310.
(4) [1909] 1 Ch. 149.
(5) [1902] 2 Ch. 746.
(6) [1909] 2 K. B. 588.
(7) [1902] 2 Ch. 746, at pp. 757, 758.
(8) (1881) 7 Q. B. D. 505.
(9) (1907) 96 L. T. 566; (1908) 98 L. T. 701.

house: *Pidgeon* v. *Great Yarmouth Waterworks Co.* (1); or to a school: *Barnard Castle Urban Council* v. *Wilson* (2); *South-West Suburban Water Co.* v. *St. Marylebone Union*. (3) There must be either a dwelling-house or at least a house which is so far adapted for the purposes to which a dwelling-house is usually adapted as to require water for domestic purposes, as in *Cooke* v. *New River Co.* (4) In the present case, where the water was supplied for use by the public in urinals and water closets on the platforms of a railway station, the element of home or residence is entirely absent.

Secondly, this water was supplied for "railway purposes" within s. 25 of the Act. Railway companies are compelled by the Board of Trade to provide sanitary conveniences for the use of the public using their stations. As the use of water for the more convenient occupation of a house or for increasing its amenities to the owner or occupier is a use for domestic purposes—see per Vaughan Williams L.J. in *Barnard Castle Urban Council* v. *Wilson* (5)—so the use of water for the more convenient user of a railway or for increasing its amenities to the public who use it is a use for railway purposes. Railway purposes and domestic purposes need not necessarily be mutually exclusive, and even assuming that the use of the water in the present case were prima facie for domestic purposes, yet if it was also for railway purposes within s. 25 of the Act it thereby becomes a use for purposes other than domestic within s. 16, and the appellants can only recover as for a supply by measure.

Danckwerts, *K.C.*, in reply. The main contention of the respondents has already been considered and decided adversely to them. In *South-West Suburban Water Co.* v. *St. Marylebone Union* (6) Buckley J. said: "Even if (which is not here the case) the premises were occupied, not as a dwelling-house by persons resident and sleeping there, but purely for the purposes of a business—say, of a factory—I should not be prepared to hold, at least without further argument, that, even in that case, the supply of water for what I may call sanitary purposes—such as

(1) [1902] 1 K. B. 310.
(2) [1902] 2 Ch. 746.
(3) [1904] 2 K. B. 174.
(4) (1888) 38 Ch. D. 56.
(5) [1902] 2 Ch. 746, at p. 754.
(6) [1904] 2 K. B. 174, at p. 179.

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supplying washstand-basins or the ordinary flushing of water closets—could be refused upon the mere ground that no one, or only a caretaker, slept upon the premises . . . . It is the character of the purpose, not the character of the premises in which the water is used, that is here the important factor. The test of residence is not a test of the purposes of user."

The second contention, that this water was supplied for railway purposes because the Board of Trade compel the respondents to provide conveniences, has also been decided against them. In *South Suburban Gas Co.* v. *Metropolitan Water Board* (1) it was held that water supplied to a gas company for use in sanitary conveniences, which the company were obliged by the Factory and Workshop Act, 1901, to provide for their workmen, was none the less supplied for "domestic purposes" within s. 8 of this Act, and not for "any trade, manufacture, or business" within s. 25.

Cur. adv. vult.

March 15. The following written judgments were delivered:—

PHILLIMORE J. This is an appeal from his Honour Judge Woodfall, who has given judgment for the defendant company.

The action was brought to recover the sum of 12*l.* as a water rate levied upon the company in respect of water supplied to the urinals and closets at their station at West Norwood, this water rate being calculated under s. 8 of the Metropolitan Water Board (Charges) Act, 1907, at the rate of 5 per cent. on the rateable value of the house or building or part of a house or building in respect of which the supply was required.

It was, as I gathered, admitted by counsel for the appellants that the amount of 12*l.* was arrived at by taking the rateable value of the whole station and could not be supported, as for this purpose the several buildings must be separately assessed. This, however, is not the point on which we were asked to decide.

The claim of the Water Board is preferred upon the ground that this water was supplied for "domestic purposes." It is resisted by the railway company (who prefer to pay by meter for

(1) [1909] 2 Ch. 666.

the water consumed) on the ground that this is not a domestic purpose, but is, if anything, a railway purpose under s. 25. A number of decisions upon the words "domestic purpose" or "domestic use," which latter is the expression in s. 35 of the Waterworks Clauses Act, 1847, have determined that if the actual use to which the water is put is domestic it does not matter that the householder is providing the means of domesticity as part of a profitable business or as carrying out a public duty. Thus, the owner of a boarding-house or a boarding school and the guardians of the poor as owners of a workhouse pay for the water consumed upon the premises for drinking, cooking, washing, and sanitary purposes in the same way as a private householder would do, that is according to a percentage upon the annual value of the house or dwelling, and not by meter. Till recently, however, decisions have, I think, been confined to cases where there was residence in the sense of pernoctation, that is, to houses or dwellings in the ordinary sense of the word. However, the last decision, that of Neville J. in the case of *South Suburban Gas Co.* v. *Metropolitan Water Board* (1), appears to have carried the matter further. There he held that the gas company in respect of buildings, offices, and works extending over forty acres where 400 people were employed were not entitled to claim to pay by meter for water supplied to their workpeople for drinking, washing, and sanitary purposes, but must pay upon the annual value. The head-note in that case represents the learned judge as having decided that the purposes for which this water was used were domestic purposes. In strictness, he did not so decide, but said that it was admitted in argument that the purposes were prima facie domestic, though it was contended that they ceased to be domestic because they were ancillary to a business carried on upon business premises. It is not necessary for us to say whether in a precisely similar case we should follow this judgment. But I think it went to the very verge of the law, and I would suggest that, if it were to be criticized, criticism would fasten upon the assumption that the purpose for which the water was used, or, at any rate, the purpose for which the water was used in the sanitary conveniences, was necessarily a

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domestic purpose. It should not be assumed that domestic means civilized or domesticated or something appertaining to man, either the natural or the civilized man. It means, I think, something to do with man as occupying or using a house or dwelling. It may be that the occupation need not be through the night as well as the day, and that what is domestic, for instance, in the case of a boarding school may also be domestic in the case of a day school or crèche. It may be, but I do not so decide, that if men or women are kept for long periods of time in a workshop or factory, their residence for long hours may be deemed to make the place to that extent their home, and, if so, the judgment in *South Suburban Gas Co.* v. *Metropolitan Water Board* (1) was right. But I confess that I should like to have seen some indication that this point had been considered. If, however, there was no residence, no commorancy, it is another matter. According to the ordinary ways of life in modern England, operations of nature are conducted in privacy, and there are conveniences in or in the curtilage of every dwelling-house, and the use of such convenience is as domestic as the use of a kitchen or the dining-room or the library. But it does not follow, because a man generally cooks, eats, and reads in his house, that the cooking of roasted chestnuts on a stall, or the eating of chocolate out of an automatic machine at a station, or the reading of a book, as Lord Macaulay used to do while walking along the street, is domestic. In the same way it does not seem to me to follow that the use of sanitary conveniences in some public place or some place of temporary resort during a journey is domestic. I have spoken of the ordinary habits of the English people of the present day; but I am not at all sure that customs were not different not so long ago, even in England, and certainly they were different, if they are not now different, in some civilized countries of Europe. Readers of Aristophanes and of Sterne's "Sentimental Journey" will recall instances of other habits.

That the use of public sanitary conveniences is not to be paid for as for a domestic purpose, either generally or under the particular Act with which we are dealing, was conceded by counsel for the Water Board. He said that the flushing of

(1) [1909] 2 Ch. 666.

those conveniences might come under s. 25 as being either "cleansing sewers and drains" or "flushing drains by means of any apparatus discharging automatically." It may be so. But if the purpose is, to use the language in *South Suburban Gas Co.* v. *Metropolitan Water Board* (1), prima facie domestic, the fact that the use of the water also keeps the drains clean seems to me on a par with the fact that the owner of a boarding-house makes his house convenient by providing suitable sanitary accommodation; or, to put it in another way, if the words I have quoted in s. 25 override the provision as to domestic purposes in s. 8, why should not the words "railway purposes" in the same s. 25 also override the words "domestic purposes" in s. 8?

This opens another consideration. But before I pass to it I should like to draw attention to the Waterworks Clauses Act, 1847, as being also deficient in any special provision as to water used in public sanitary conveniences: see s. 37. Perhaps in those ruder times such conveniences were rarer and were seldom, if ever, flushed automatically.

Now I come back upon the expression "railway purpose." It may override the words "domestic purpose" as the words as to flushing the drains may override domestic purpose; and it must override them if every attention to the calls of nature is a domestic purpose. I prefer to construe this expression as a statutory indication in both cases that domestic purposes do not mean every compliance with the calls of nature, but only the use of sanitary conveniences as part of the house in which the person using them is residing.

On the whole, therefore, I think that this appeal fails.

It has not escaped my notice that one out of several of these conveniences is set apart for porters using the railway station, in which respect this case comes near that of *South Suburban Gas Co.* v. *Metropolitan Water Board.* (1) But no special point was made as to this particular convenience; and, if it were to be made, the annual value of that lavatory would, by itself, be so small as to make the 5 per cent. charge upon it not worth considering.

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I have not specially commented upon, but I have not forgotten, the argument drawn from the omission of the words "railway purposes" from s. 9, where provision is made for rebates in respect of buildings used for trade purposes.

BUCKNILL J. The question is whether the county court judge from whose decision this appeal comes is right in holding that the water supplied by the appellants to the West Norwood railway station of the respondent company is not water supplied for "domestic purposes," but for "railway purposes" within the meaning of the Metropolitan Water Board (Charges) Act, 1907. The undisputed facts are that at this station there is no stationmaster's house, but only the usual waiting rooms, porters' room, and booking office. On the up and down platforms are urinals for gentlemen and two water closets, one for "passengers," and the other for the use of the "staff." These are flushed by water supplied by the Water Board. There is also on each platform a draw-off water tap from which is drawn water for cleansing the platform and whatever may be required for drinking.

Until the Metropolitan Water Board (Charges) Act, 1907, came into force, water supplied to this station for these same purposes was always charged for by meter, and it is in fact so supplied at the present time, and if the county court judge is right in his decision it will continue to be so supplied. But the appellants' contention is that the water is supplied for "domestic purposes," in which case the charge will be a percentage on the principle of rateable value. The figures are unimportant for the purpose of this case.

Urinals and water closets are to-day as necessary a part of a railway station as they are of a dwelling-house; and it may be assumed that at this station only such arrangements have been made as are necessary for the convenience of the public using it in the way of the company's business.

Counsel for the appellants cited to the Court ss. 8, 9, 13, 16, and 25 of their Act of 1907. By s. 8 they are bound, on the request of the owner or occupier of any house or building or part of a house or building occupied as a separate tenement, he being

entitled to require a supply for "domestic purposes," to furnish such supply on the principle of rateable value as distinguished from meter charge for the same. By s. 9 certain rebates must be made by the Board where water is supplied by them for "domestic purposes" to any house or building or part of any house or building occupied solely for the purposes of any trade or business or of any profession or calling by which the occupier seeks a livelihood or profit and occupied as a separate tenement and assessed to the poor rate but not charged with the payment of inhabited house duty. Sect. 16 provides for the supply of water by the Board by measure for purposes other than "domestic" in cases coming within the requirements of that section. Sect. 25 provides that for the purposes of the Act the expression "domestic purposes" shall be deemed to include water closets and baths as therein described, but shall not include a supply of water for, amongst other purposes not material in this case, "railway purposes" or "any trade, manufacture, or business."

The question is therefore whether the water supplied to this station is in the circumstances for domestic purposes, or for railway purposes, or for a business, within the meaning of those clauses of the Act. Many authorities were referred to, but the one on which the appellants relied chiefly, and which was said to be exactly in point, is *South Suburban Gas Co.* v. *Metropolitan Water Board.* (1) The facts were that the plaintiffs (a gas company), for the purposes of their business, were in possession of buildings and works extending over forty acres. No person slept or resided on the premises, nor was any part thereof charged with the payment of inhabited house duty. A stream flowing through their premises supplied them with water for their gasworks and engines, but the water required for lavatories and sanitary arrangements for their employees, including water for washing and drinking, was supplied by the Water Board, for which a charge was made on the rateable value of the premises, in other words as for "domestic purposes." The plaintiffs contended that they should only be charged by measure or meter as for a trade or business within s. 16 of the Act. Neville J. held in effect on the facts of that case that the use of the water was

(1) [1909] 2 Ch. 666.

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for domestic purposes, and it appears to me that he made s. 9 of the Act the basis of his judgment. Having said that the effect of the authorities cited was that the question was not whether the premises were used for business purposes, but whether the water was used for business purposes, he proceeded thus: "The conclusion that such is the true construction to be placed upon s. 16 with reference to s. 25 is, I think, very much assisted by the provisions of s. 9, which provides for a rebate upon the water rate in cases where a house or building or part of a house or building is occupied solely for the purposes of trade or business or any profession or calling by which the occupier seeks a livelihood. It seems to me that that is an exact definition of the purposes for which the buildings of the plaintiffs in the present case are used."

If the only question for our decision was the use of water for the railway staff at this station, I should not be prepared to disagree with the language of Neville J. just quoted, even if he had not authority to support it, which I think he had, but, for reasons I shall give later on, I think that there is a great difference between the use of water at a railway station by the staff and that by the public, who use the station either as the paying customers of the company or as their licensees.

The next case relied on by the appellants is *Frederick* v. *Bognor Water Co.*(1), which turned on the meaning to be given to the words "business for which water is required" in any dwelling-house, and it was held that the keeping of a boarding-house in which water was used for domestic purposes by all the inmates was not carrying on a business for which water was required, although such inmates might be engaged in carrying on or be themselves an element in the carrying on of the business. But in my opinion that case does not cover all the facts of this case, but only such as comprise the use of water for the staff for sanitary purposes, and not the use of water for similar purposes by the other class, that is, the public and others lawfully using the station. The same observation applies to *Pidgeon* v. *Great Yarmouth Waterworks Co.* (2), which was the case of a boarding-house business being carried on in a dwelling-house; there

(1) [1909] 1 Ch. 149. (2) [1902] 1 K. B. 310.

Lord Alverstone C.J. said: "In the present case all I decide is that, where it is found that there is no use of the water except for domestic purposes, and that there is no use of it by any person who is not an inmate of the house in the ordinary sense, then the company are bound to supply according to the scale for domestic purposes." Both Darling J. and Channell J. expressed an opinion that their judgments were not to be taken as going beyond the particular facts of the case, and Darling J. mentioned particularly the cases of an inn or hotel as not coming within it.

I have referred to the last two authorities as they were much relied on by the appellants, but in the case of *South Suburban Gas Co.* v. *Metropolitan Water Board* (1), as well as in this case, both of which turn on the language of the Metropolitan Water Board (Charges) Act, 1907, I consider them of less assistance to guide me as to what my judgment here should be than would be the case but for the express provisions of s. 9, which shew clearly that the Legislature contemplated a domestic user supplied to a house or building occupied solely for a trade or business, which in my opinion might include the business of a railway, for a business it certainly is.

I shall now proceed to give my reasons shortly why the use of water for the flushing of urinals and water closets set aside for the public at this railway station is not for domestic purposes. In the first place, it would be an exaggeration of the ordinary meaning of the word "domestic" to apply it to the mere act of hand-washing or using the offices in question. It could hardly be contended that to use a street convenience would be a domestic use, so as to make the water used there for flushing purposes a user for domestic purposes; nor where a man carries on a business where people are charged a sum of money for the washing of hands and the brushing of hair, and it is common knowledge that places of business exist where that is done. Such a user would be a business user as distinguished from a domestic user, and in neither case could it be said, in my opinion, that there is any element of domesticity. In neither

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case is there any abiding or staying in the place where the user takes place.

We are no doubt bound by those cases which have decided that the proper test is the character of the purpose and not the character of the place, but that test begs the question here, because in all those cases, even in *South Suburban Gas Co.* v. *Metropolitan Water Board* (1), which has gone, I venture to think, a little further than any other case on the subject, there has been a daily stay on the premises by the persons using the water for the purposes mentioned. But at a railway station the passenger or the public lawfully using it do not remain longer than obliged in each particular case. They either go to the station to get into a train, or, getting out of a train, they leave the station at the earliest moment. Is such an user for domestic purposes or for railway purposes? It is admitted that a railway company is bound by the Board of Trade to provide these conveniences for the use of the public, so that they are a necessary part of the whole railway undertaking, and in my opinion the purpose of the user is a railway purpose just as much as the user of the water which washes the platform or is used for cleansing other parts of the station. For these reasons I am of opinion that this appeal fails.

Appeal dismissed.

Solicitor for appellants: *Walter Moon.*
Solicitor for respondents: *P. V. Rose.*

NOTE.—Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.):—

Sect. 8: "Subject to the provisions of this Act the Board shall at the request of the owner or occupier of any house or building or part of a house or building occupied as a separate tenement in any street within the limits of supply in which any service main or service pipe of the Board shall be laid or of any person who under the provisions of this Act shall be entitled to require a supply of water for domestic purposes furnish to such owner or occupier or other person by means of a communication pipe or communication pipes and other necessary and proper apparatus to be provided and laid down and maintained by him and at his cost a sufficient supply of water for

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(1) [1909] 2 Ch. 666.

domestic purposes at a rate per annum which shall not exceed five per centum of the rateable value of the house or building or part of a house or building in respect of which the supply is required and such rate shall subject to the provisions of this Act be charged uniformly under like circumstances to all consumers entitled to such supply."

Sect. 9: "Where under the foregoing provisions of this Act the Board furnish a supply of water for domestic purposes to any house or building or part of a house or building occupied solely for the purposes of any trade or business or of any profession or calling by which the occupier seeks a livelihood or profit and occupied as a separate tenement which is assessed to the poor rate or other rate in which such last mentioned rate is included in a sum exceeding three hundred pounds per annum and is not charged with the payment of inhabited house duty the Board shall make or allow from the water rate payable in respect of such supply a rebate or discount of such amount (not being less than twenty per centum or more than thirty per centum of such water rate) as the Board may from time to time determine and such rebate or discount shall from time to time be made or allowed from the water rate payable in respect of every such supply as aforesaid and at a uniform rate per centum: Provided that in making or allowing such rebate or discount the water rate shall not in any case be less than would have been payable in respect of any house or building or part of a house or building occupied as a separate tenement assessed to the poor rate or other such rate as aforesaid in a sum of three hundred pounds per annum."

Sect. 16: "(1.) The Board shall at the request of any owner or occupier of any premises situate in or adjoining any street in which any main or service pipe of the Board is or shall be laid who requires for use on such premises a supply of water by measure for purposes other than domestic and by means of communication pipes and other necessary and proper apparatus to be provided laid and maintained by and at the cost of the person requiring such supply afford a supply of water by means of a meter or other fit and sufficient instrument or apparatus supplied (at the cost of such person as aforesaid) or approved by the Board for measuring and ascertaining the quantity of water so supplied.

"(2.) The Board shall charge for any supply furnished by them under the last preceding sub-section of this section not exceeding the following rates for every one thousand gallons (that is to say):—

"When the quarterly consumption of water does not exceed 50,000 gallons eleven pence;

"When exceeding	50,000	gallons	and not exceeding	100,000	gallons	10*d.*;
,,	,,	100,000	,,	,,	,,	,,	200,000	,,	9½*d.*;
,,	,,	200,000	,,	,,	,,	,,	500,000	,,	9*d.*;
,,	,,	500,000	,,	,,	,,	,,	1,000,000	,,	8½*d.*;
,,	,,	1,000,000	,,	,,	,,	,,	3,000,000	,,	8*d.*;
,,	,,	3,000,000	,,	,,	,,	,,	5,000,000	,,	7*d.*;
,,	,,	5,000,000	,,						6⅛*d.*;

. . . . Provided . . . . that the whole of the water taken within any railway premises which form one area for railway purposes and are connected otherwise than by the running lines of the railway company shall be reckoned as one supply and chargeable accordingly notwithstanding that

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the water may in fact be delivered thereat through two or more meters pipes or other necessary and proper instruments . . . . "

Sect. 25: "In and for the purposes of this Act the expression 'domestic purposes' shall be deemed to include water closets and baths constructed or fitted so as not to be capable of containing when filled or filled up to the overflow or waste pipe (if any) more than eighty gallons but shall not include a supply of water for any of the following purposes (namely):— Steam gas motor and other like engines; railway purposes; ventilating purposes; working any machine or apparatus; consumption by or washing of horses or cattle; washing carriages or other vehicles; watering gardens by means of any outside tap or any hose tube pipe sprinkler or other like apparatus; fountains or any ornamental purpose; cleansing sewers and drains; cleansing and watering streets or roads; fire extinction; flushing drains by means of any apparatus discharging automatically; public pumps baths or washhouses; any trade manufacture or business; any bath constructed or fitted so as to be capable of containing when filled or filled up to the overflow or waste pipe (if any) more than eighty gallons."

W. H. G.

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March 18.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* FREDERICK MOON.

THE KING *v.* EMILY MOON.

Children—Girl under the Age of Sixteen Years—Encouraging Seduction—Children Act, 1908 (8 *Edw.* 7, *c.* 67), *s.* 17.

By s. 17 of the Children Act, 1908, it is provided that if any person having the custody, charge, or care of a girl under the age of sixteen years causes or encourages the seduction or prostitution of that girl, he shall be guilty of a misdemeanour:—

Held, that the word "seduction" in the above enactment means inducing a girl to surrender her chastity for the first time.

Therefore where a father, having the custody of his daughter, a girl under the age of sixteen years who had already been seduced, subsequently encouraged an illicit intercourse between the girl and her seducer:—

Held, that he did not thereby encourage the seduction of the girl within the meaning of the enactment.

APPEALS from convictions under s. 17 of the Children Act, 1908. (1)

(1) The Children Act, 1908 (8 Edw. 7, c. 67):—

Sect. 17: "(1.) If any person having the custody, charge, or care of a girl under the age of sixteen years causes or encourages the seduc-

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The appellants, Frederick Moon and Emily Moon, his wife, were tried before Channell J. at the Kent Winter Assizes on February 21, 1910. The indictment charged that the prisoners, being persons having the custody of Bessie Moon, a girl under the age of sixteen, to wit, fifteen years of age—

1. Did on September 10, 1909, at High Halden unlawfully cause the seduction of the said Bessie Moon;

2. Did on the same day and at the same place encourage the seduction of the said Bessie Moon;

3. Did on October 22, 1909, at the same place cause the seduction of the said Bessie Moon; and

4. Did on the same date and at the same place encourage the seduction of the said Bessie Moon.

The following facts appeared from the shorthand notes taken at the trial:—In May, 1909, the prisoners with their family, consisting of a daughter, Bessie, who was born on November 15, 1894, and five other children, of whom one was older and four were younger than Bessie, lived in a hop hut at Little Chart, in the county of Kent. In the same hut lived one William Alfred Burns. While living there Burns on two occasions had connection with the girl Bessie. For this he was convicted under s. 5 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), and sentenced to three months' imprisonment with hard labour at the Kent Assizes in November, 1909.

In June, 1909, the prisoners with their family and Burns left Little Chart and went to Great Hingham, where they all slept in a barn, Burns and the girl Bessie sleeping together in a corner of the barn. On September 13, 1909, they all left Great Hingham and went to High Halden, where they all slept in a barn of 13 ft. 3 in. by 8 ft. 2 in., Burns and the girl Bessie sleeping together in a corner of the barn.

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tion or prostitution of that girl, he shall be guilty of a misdemeanor and shall be liable to imprisonment, with or without hard labour, for any term not exceeding two years.

"(2.) For the purposes of this section a person shall be deemed to have caused or encouraged the seduction or prostitution (as the case may be) of a girl who has been seduced or become a prostitute if he has knowingly allowed the girl to consort with, or to enter or continue in the employment of, any prostitute or person of known immoral character."

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In July, 1909, the girl was found to be pregnant, and in February, 1910, she was delivered of a child.

Channell J., in summing up, told the jury that the prisoners were persons who, having the care and custody of a girl under the age of sixteen years of age, were guilty of an offence if they caused or encouraged her seduction or prostitution. The learned judge continued as follows: "The words 'seduction or prostitution' occur together in the context, but the difference, I should think, is that prostitution means the surrender of a girl's chastity for money. The word 'seduction' is generally used, in popular language, as meaning the first leading away of a woman from the paths of virtue, but it does not necessarily have that meaning, and I propose to tell you for the purposes of this case . . . . although I think it is a matter of considerable doubt, that the word 'seduction' in this clause of the statute is not confined to the first connection of an unmarried woman, which is the sense in which the word is sometimes used, but that it covers a case of fornication or continual connection between unmarried persons. If in your opinion either this man or this woman either caused or encouraged Burns and the girl to have connection with each other, then they are guilty of this offence, although it may be that they did not encourage the first connection between Burns and the girl if it happened without the prisoners' knowing anything about it . . . ."

The learned judge proceeded as follows: "Now the question on the facts is, assuming that to be the true meaning of the word 'seduction,' did either of the prisoners cause or encourage it? I cannot help thinking that if the parents of an unmarried girl under the age of sixteen allow her in their company, in the place where they are sleeping, to go and sleep with a man night after night, although you may not say they are causing it, they are certainly encouraging it. The woman tells you that they would do it whether she wished it or not, and she did not wish it; and if you believe that she is not guilty. As to the man, he has not told us anything about what he knew and what he did not know; but there he was himself sleeping in the barn. It is entirely for you to consider whether you think as a matter of fact that it is proved to your satisfaction that there was connection going on

between the man Burns and the girl other than on the two occasions earlier in their acquaintance when they were at Little Chart. If you think that it is not proved that there was any connection between them, excepting on the two occasions which Burns admits, then it would not be safe to convict the prisoners, for it certainly seems to me that there is very little ground for saying that either of these two prisoners encouraged any connection on those two occasions, because, although they might have done it on the second, it is quite possible they might not. But if you think, on the whole of the evidence, it is clear that this connection between Burns and the girl, after those two occasions, had been going on in this barn, when they were sleeping together night after night, then there is a substantial case for you to consider whether or not one or both of the two prisoners in point of fact encouraged that which was going on. The word 'encouraging' is not defined any more than the word 'seduction' is in this Act of Parliament, or any more than any of the other expressions are defined. 'Causing' one can understand; 'encouraging' is a very much vaguer term, but it seems to me that it means doing something more than merely not preventing. . . . . Encouraging seems to me to mean actively doing something; but the conduct of the prisoners is a matter for your consideration, and it is for you to say, considering that they were sleeping in this barn night after night, whether you are not satisfied that the mother must have been encouraging it, and whether the father also was not encouraging it. He is there and he is a person with authority; or at least he ought to have authority. . . . . He ought to have interfered; but, after all, the mere non-interference I do not think is enough. You must find something that he was doing before you can find that he was encouraging or causing. If you think either of them did really encourage an unlawful connection between the man Burns and the daughter, then you should find that one guilty, or if you think both encouraged it, you may find both of them guilty. It is a criminal charge, and therefore it has to be proved by the prosecution. If you think that it has not been proved that either of them, or both of them, did encourage the unlawful connection between Burns and their

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daughter, then you ought to find them not guilty. If you think they did, then you should find them guilty, because, as I have said, 'seduction' is not to be confined to the first connection with an unmarried girl. I think it is reducing the clause of the Act of Parliament into rather too narrow limits if you confine it to such a meaning as that. I think it covers a case of a person who, having the custody of a girl, encourages carnal intercourse between her and a man. I do not think it is intended to mean seduction in the sense in which that word is generally used. That is all I can say to help you, and now perhaps you will consider your verdict and tell me whether you find the prisoners or either of them guilty or not guilty."

The jury found both prisoners guilty. Frederick Moon was sentenced to four months' and Emily Moon to six months' imprisonment with hard labour.

The prisoners appealed.

H. Stuart Sankey, for the appellants. The question in this case is what is meant by the word "seduction" in s. 17 of the Children Act, 1908. Assuming that the appellants encouraged Burns to have carnal knowledge of the girl, that is not to encourage her seduction where, as in this case, she had been seduced months before the offence alleged. Carnal knowledge is a well-known term in criminal legislation: see, for example, s. 5 of the Criminal Law Amendment Act, 1885, where that expression is used. That it is not the same thing as seduction is clear from the fact that in s. 12 of that Act the word "seduction" is used. That section provides that where on the trial of any offence under the Act it is proved that the seduction or prostitution of a girl under the age of sixteen has been caused, encouraged, or favoured by her father, mother, guardian, master, or mistress, the Court shall have the powers therein specified. Seduction there means something more than inducing carnal knowledge. If the Legislature, having used that expression in s. 5, had meant the same thing in s. 12, why did it not use the same expression? Sect. 17 of the Children Act, 1908, is framed upon s. 12 of the Criminal Law Amendment Act, 1885, and the word "seduction" in the later Act must mean the same thing as it does in the earlier Act.

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That word means inducing a woman to surrender her chastity for the first time. The learned judge was wrong in telling the jury as he did that the word "seduction" in s. 17 of the Children Act, 1908, was not confined to the first connection, but included a continual connection between unmarried persons. Moreover, there is no evidence of any encouragement by the appellants. Mere permission is not encouragement. Nothing more than mere permission was proved.

H. C. Dickens, for the Crown. There is no reason for confining seduction to the first act of carnal intercourse. The word means leading aside. In Webster's Dictionary it is defined as "the act of seducing, or of enticing from the path of duty; specifically, the act or crime of persuading a female to surrender her chastity." In Ogilvie's Dictionary it is defined as "the act or crime of persuading a female, by flattery or deception, to surrender her chastity." Under the word "chastity" the Century Dictionary cites Jeremy Taylor (Holy Living and Dying, ch. 2, s. 3): "Chastity is either abstinence or continence; abstinence is that of virgins or widows, continence of married persons." Seduction in its natural sense includes leading aside from the path of virtue one who has already fallen from it but is not living an immoral life. The proximity of the word "prostitution" in s. 17 of the Act indicates that seduction is intended to include something besides a first act of incontinence.

The judgment of the COURT (Lawrance, Jelf, and Bray JJ.) was delivered by

LAWRANCE J. These convictions must be quashed. The appellants were convicted on an indictment containing four counts, the first charging them with causing the seduction of Bessie Moon, a girl under the age of sixteen years; the second with encouraging the seduction of the girl on September 10, 1909; and the third and fourth counts charging them with causing and encouraging the seduction of the girl on October 22, 1909, they being persons having the custody of the girl.

The evidence shews that the appellants, who were the father and mother of the girl, were in May and June, 1909, living in a cottage at Little Chart in which there was also living at the

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same time a man named Burns. While they were living there this man had on two occasions had carnal connection with the girl, as the result of which she became pregnant. The man Burns was apprehended and tried at the Kent Assizes for an offence under s. 5 of the Criminal Law Amendment Act, 1885, and was sentenced to three months' imprisonment with hard labour.

In June, 1909, the appellant with his family and Burns left Little Chart and went to Great Hingham, where they remained till September. All this time the man was living and sleeping in the same barn with the girl, and the jury were well warranted in coming to the conclusion that, after leaving Little Chart, the man had connection with the girl. Every opportunity was given him for so doing, and if affording facilities is the same thing as encouraging he was encouraged by the father and mother to continue having carnal intercourse with the girl.

Then the father and mother were indicted for causing and encouraging the seduction of the girl under s. 17 of the Children Act, 1908.

There is in this case no question of prostitution, and the whole case turns upon the meaning of the word "seduction" in that section. Has the word the wide sense of inducing a girl to have carnal connection at any time or on any occasion, or is it used in the usual and ordinary sense of inducing a girl to part with her virtue for the first time? The key to the position seems to be this: if mere carnal knowledge was intended there was no object in using the words "seduction or prostitution." Carnal knowledge is an expression well known in criminal statutes. The Act might easily have run thus: Any person having custody of a girl under the age of sixteen years who causes or encourages a man to have carnal knowledge of her shall be guilty of a misdemeanour. The Legislature has not used those words, which it might have used if it had thought fit and which would have been much more appropriate than the words "prostitution or seduction" if the intention had been to bring within the scope of this Act any person who, having the charge of a girl under the age of sixteen years, encourages carnal knowledge of her by a man irrespective of the question

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whether she has or has not previously lapsed from the path of virtue. We must therefore come to the conclusion that seduction in this Act has its ordinary sense of inducing a girl to part with her virtue for the first time. If a wider scope is desired the Act can be amended. As it stands at present we have no doubt that to encourage the seduction of a girl means to encourage her to surrender her chastity for the first time. The convictions must therefore be quashed.

Appeals allowed.

Solicitor for appellant: *The Registrar of the Court.*
Solicitor for the Crown: *The Director of Public Prosecutions.*

W. H. G.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

C. A.
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March 18.

In re GENTRY.

Bankruptcy—Debt—Payment—Petitioning Creditor—Neglect to appear—Second Petition—Leave—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 7, *sub-s.* 5 *—Bankruptcy Rules*, 1886 *to* 1890, *rr.* 163, 165.

Where a debtor against whom a bankruptcy petition has been presented disputes the debt of the petitioning creditor, and the usual order is made under s. 7, sub-s. 5, of the Bankruptcy Act, 1883, for a stay of proceedings on the petition, upon the debtor giving security, for the trial of the question of the validity of the debt, and upon the trial of that question the debtor admits the debt and pays the amount of the debt and costs into Court, the petitioning creditor is not bound to accept payment of the debt by taking the money out of Court, but may proceed with the bankruptcy petition, and, subject to any other objections which may arise upon the hearing of the petition, a receiving order may be made upon it.

So *held* by the Court of Appeal, reversing the decision of the Divisional Court.

Where a petitioning creditor gives notice to the debtor that he does not intend to proceed with the petition, and, on the application of the creditor's solicitor, the petition is dismissed, the creditor has not neglected to appear on his petition, within r. 163 of the Bankruptcy

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Rules, so as to require the leave of the Court for the presentation of a subsequent petition on the same act of bankruptcy.

So *held* by the Divisional Court.

APPEAL from Great Yarmouth County Court.

On July 6, 1909, a bankruptcy petition was presented against the debtor by four petitioning creditors, whose alleged debts amounted to 56*l.* 17*s.* 3*d.* The act of bankruptcy was a deed of assignment for the benefit of creditors executed by the debtor on June 11, 1909. Subsequently to the filing of the petition, the debt of one of the petitioning creditors, amounting to 8*l.* 5*s.* 9*d.*, was paid by the debtor, and leave was obtained to add as petitioning creditors two persons named Reed and Cook, who were alleged to be creditors for 4*l.* 3*s.* 6*d.* and 4*l.* 17*s.* respectively, making a total of petitioning creditors for 57*l.* 12*s.* Notice of appeal against the joinder of these two creditors was given by the debtor, but before the appeal had been heard the petitioning creditors gave notice of discontinuance, and on August 7, on the application of their solicitor, the petition was dismissed with costs. On August 19 a second petition in bankruptcy was presented, the petitioning creditors being the same as in the former petition, after the amendment, and the act of bankruptcy being the same. The costs ordered to be paid to the debtor on the dismissal of the former petition had not at this date been taxed or paid. On September 6 the debtor gave notice that on the hearing of the petition he would dispute his indebtedness to Reed and Cook, and would require their respective accounts to be established in due course of law. The petition came on for hearing on September 14. On behalf of the debtor a preliminary objection was taken to the hearing of the petition on the ground that it had been filed without the leave of the Court having been first obtained under the Bankruptcy Rules, 1886 to 1890, r. 163. (1) The registrar overruled the objection and made an order under s. 7, sub-s. 5, of the Bankruptcy Act, 1883 (2), staying

(1) Bankruptcy Rules, 1886 to 1890, r. 163: "If any creditor neglects to appear on his petition, no subsequent petition against the same debtor . . . . shall be presented by the same creditor in respect of the same act of bankruptcy without the leave of the Court to which the previous petition was presented."

(2) Bankruptcy Act, 1883, s. 7, sub-s. 5: "Where the debtor

proceedings on the petition for the trial of the question of the validity of Reed's and Cook's respective debts, security by bond or deposit to the amount of 15*l.* to be given by the debtor within seven days. A bond with two sureties was duly given. Cook issued a plaint in the county court against the debtor for the amount of his debt and costs, making 5*l.* 7*s.* in all. The debtor admitted 2*l.* 11*s.* 6*d.*, and paid that sum and 8*s.* costs into Court, and gave a notice of set-off and counter-claim as to the balance, 2*l.* 5*s.* 6*d.*, of the debt. At the hearing the claim was by leave increased to 6*l.* 2*s.*, and judgment was given for that sum without costs, and judgment was given for the debtor on his counter-claim for 2*l.* 5*s.* 6*d.* with 1*l.* 17*s.* costs, leaving a balance due to Cook of 1*l.* 19*s.* 6*d.* In Reed's case a plaint was issued for 4*l.* 3*s.* 6*d.*, which sum the debtor paid into Court. Neither Cook nor Reed took out of Court the sums respectively found due to them. At the adjourned hearing of the petition it was contended that by reason of the payment into Court of Reed's and Cook's debts the amount of the petitioning creditors' debts was reduced to 48*l.* 11*s.* 6*d.* The registrar held that the payments into Court could not in the circumstances be treated as equivalent to acceptance by the two creditors in question of their debts, and that the aggregate amount of the debts owing to the several petitioning creditors was, therefore, 54*l.* 14*s.* 6*d.* He accordingly made a receiving order.

The debtor appealed.

Jan. 31. *F. Dodd*, for the appellant. First, the petitioning creditors neglected to appear on the first petition within the meaning of r. 163, and under that rule they were, therefore, not entitled to present another petition in respect of the same act of bankruptcy without the leave of the Court: *Ex parte Love, In re Jagger.* (1) Secondly, the aggregate amount of debts owing to

appears on the petition, and denies that he is indebted to the petitioner . . . . the Court, on such security (if any) being given as the Court may require for payment to the petitioner of any debt which may be established against him in due course of law, and of the costs of establishing the debt, may, instead of dismissing the petition, stay all proceedings on the petition for such time as may be required for trial of the question relating to the debt."

(1) (1874) L. R. 17 Eq. 454.

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the petitioning creditors does not amount to 50*l.*, for the payment into Court of the sums respectively due to Cook and Reed terminated the debtor's indebtedness to them. There was also at the date when the second petition was presented a sum owing by the petitioning creditors to the debtor for costs, and, apart from the question as to Cook's and Reed's debts, the deduction of this sum would reduce the aggregate amount of the debts below 50*l.*

F. Mellor, for the respondents.

[PHILLIMORE J. We do not require to hear you as to r. 163.]

After notice of an act of bankruptcy and the presentation of a petition a creditor is not bound to accept payment of a debt: *Ex parte Boss* (1); *In re Lowe* (2); and where proceedings have been taken under s. 7, sub-s. 5, of the Bankruptcy Act, 1883, to establish a debt payment of the debt into Court is not equivalent to payment to the creditor, unless the creditor takes the money out of Court. He may, but he is not bound to, do so. Under r. 165, when the question has been decided in favour of the validity of the debt, the proceedings have to go back to the registrar, but if the creditor could be compelled in the course of the proceedings to accept payment of the debt there would be no need for this to be done.

[PHILLIMORE J. In the argument of Mr. Winslow, Q.C., in *Ex parte Boss* (1) he seems to have assumed that the debtor is at liberty to pay the debt when proceedings are taken to establish its validity.]

Yes, but Bacon C.J., in giving judgment, said (3): "If I were to admit the validity of Mr. Winslow's argument, it would be in the power of a debtor to stop proceedings and avert the bankruptcy, after committing an act of bankruptcy, upon tendering the debt." There can be no reason in principle why a debtor should, by the mere act of disputing the validity of a debt, which ex hypothesi is really due, be enabled to pay the debt and get rid of the bankruptcy proceedings; whereas if he does not dispute the debt he cannot do so. It is true that s. 7, sub-s. 5, says that the debtor may be required to give security

(1) (1874) L. R. 18 Eq. 375. (2) (1890) 7 Morr. 25.
(3) L. R. 18 Eq. at p. 380.

for "payment to the petitioner of any debt which may be established," and that under the terms of the bond the bondsman may be compellable to pay, but it does not follow that the creditor is bound to accept payment. With regard to the claim to set off the amount due for costs, at the date of the presentation of the second petition the costs had not been taxed, and, therefore, it was an unascertained amount and, at the utmost, only a liability.

PHILLIMORE J. In this case several points have been taken on behalf of the appellant. In the first place it is said that the requirements of r. 163 have not been complied with, the fact being that some or all of the petitioning creditors were the creditors on a previous petition which had been discontinued and abandoned, and, it is said, they were therefore creditors who in the language of r. 163 had neglected to appear on the hearing of the former petition, and that consequently they were not entitled to present another petition without the leave of the registrar. In my opinion r. 163 does not apply to the circumstances of this case. The object of the rule is to prevent a creditor from playing fast and loose; a creditor is not to be allowed to render futile the hearing of his petition by not appearing, as he is required to do, not as a party, but as a witness; and if he does so he is not to be allowed to present another petition on the same act of bankruptcy without leave. But no such mischief as is aimed at by r. 163 has occurred here. The petitioning creditors were advised that there was some objection to the form of the first petition, and they thereupon adopted the sensible course of giving a notice of discontinuance, and on the date fixed for the hearing their solicitor appeared before the registrar and consented to the petition being dismissed. The creditors themselves did not appear as witnesses at the hearing (to which the rule primarily relates), and it was not necessary that they should do so, as they had previously given notice to the debtor that they did not intend to ask for an order of adjudication. I am therefore of opinion that the registrar held rightly that there was nothing in this point.

Another point, which I may now dispose of, was that the

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debtor had a set-off for the costs of the first petition against the petitioning creditors' debts. If these costs had been taxed before the hearing of the second petition and the debtor had given the proper notice as to setting up a cross-claim, as at present advised I am inclined to think the point would have been a good one; but as those costs had not been taxed and the amount had therefore not been ascertained, and as the debtor has never given any notice that he intended to dispute the petitioning creditors' debts on this ground, I think the objection fails.

But another point was taken on behalf of the debtor on which I am of opinion he is entitled to succeed. This is one of those cases in which a number of creditors for small sums have joined together in one petition. The debtor gave notice that he disputed the debts of two of them named Cook and Reed, and accordingly an order was made under s. 7, sub-s. 5, of the Bankruptcy Act, 1883, that proceedings should be taken for the trial of the question of the validity of those debts, and the debtor was ordered to give security for the amount of the debts and costs. Security was duly given by the debtor, and proceedings were taken in the county court. In Cook's case the result was that the county court judge found that a sum of 1*l.* 19*s.* 6*d.* was all that was due to him, and, as more than that had been paid into Court by the debtor, if Cook could be compelled to accept payment of his debt he was in fact paid. In Reed's case, after a plaint had been issued in the county court, the debtor paid into Court the whole of the amount claimed and costs. Neither of these two creditors has taken the money out of Court, and the question which we have to decide, in substance, is whether they can be compelled to do so, for if they can the petitioning creditors' debts will be reduced to a sum less than 50*l.* It is no doubt well settled that a creditor cannot in the ordinary way be required to accept payment of his debt after he has presented a bankruptcy petition, the reason being that if he were to accept payment he would, in the event of other bankruptcy proceedings, have to repay the money and he would be limited to his proof in the bankruptcy, possibly under worse circumstances than if he had proceeded with his original

petition. On the other hand a creditor may, if he chooses to run that risk, accept payment of his debt after a bankruptcy petition has been presented. But it is contended that, as a creditor cannot be compelled to accept payment, the debtor in the present case cannot rely on the payments into Court as payments which have been accepted by the creditors, and that, the debts of Cook and Reed having been established pro tanto, there are debts due to the petitioning creditors exceeding in the aggregate 50*l*. We have therefore to decide as to the effect of payment of money into Court in proceedings taken under s. 7, sub-s. 5, which question, strangely enough, does not appear to have ever been the subject of judicial decision. It is part of the procedure under that sub-section that the debtor may be required to give security for payment of any debt which may be established against him, and the security is for payment, not to the Court or to the trustee in bankruptcy, but to the petitioner. He is the person to whom, it is contemplated, payment will be made, if the order is made establishing the debt. Prima facie it is the duty of every person to do that which he is ordered by a judgment to do, and therefore there is a prima facie duty on the judgment debtor to pay a judgment debt and also to relieve the bondsman who has given security for the payment of the debt. That being so, it seems to me that if as a result of proceedings under s. 7, sub-s. 5, the debt is established against the debtor, it is his duty not merely to tender, but to pay, the debt to the petitioning creditor, and the creditor is entitled to receive it. The creditor is not bound to do so, but he is not, in my opinion, entitled to say that he will not accept payment of his debt, and will nevertheless proceed with the bankruptcy. Otherwise the provisions of the sub-section as to giving security for payment would be rendered nugatory. The section provides a special procedure, which possibly is not entirely symmetrical with the general law of bankruptcy, but is intended to meet the particular case of a denial by a debtor of his indebtedness. I observe that in *Ex parte Boss* (1) counsel for the purpose of his argument assumed that under s. 9 of the Bankruptcy Act, 1869, which

(1) L. R. 18 Eq. 375.

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corresponds with s. 7, sub-s. 5, of the Act of 1883, the debtor was at liberty to pay the creditor, but it was not necessary in the circumstances of that case to decide the point. The result is that inasmuch as the two petitioning creditors, Cook and Reed, can safely accept payment of their debts, and can in fact get their money, they are not entitled to put in force the stringent provisions of the bankruptcy law in order to help their fellow-petitioners or for any other purpose. It follows from this that the petitioning creditors' debts do not amount in the aggregate to 50*l.*, and this appeal must therefore be allowed.

BUCKNILL J. I am of the same opinion. I entirely agree with what Phillimore J. has said with regard to r. 163. I do not think that there was any neglect by the petitioning creditors to appear on the first petition, as the fact is that the petition was dismissed by consent. With regard to s. 7, sub-s. 5, it is said that the payment into Court by the debtor was not such a payment as enabled the creditors to take the money out of Court in satisfaction of their respective debts. I do not think that that contention is well founded. The procedure under this sub-section is that, if the debtor denies that he is indebted to the petitioner, the Court may direct that it shall be ascertained by legal process whether there is a debt or not, and the section provides that the Court may require security to be given "for payment to the petitioner of any debt which may be established" against the debtor. Therefore it is clear to my mind that the section contemplates that a payment of the creditor's debt, when established, by means of the security would be a good payment. The section does not in terms say whether, apart from the security, the debtor may himself pay; and one must therefore fall back on the general principle that when a judgment is given against a man for payment of a sum of money it is his duty to pay it. There is nothing in the Act to say that, when a debt has been established in due course of law under s. 7, sub-s. 5, the debtor may not pay it or the creditor may not receive it, and, in the absence of any provision to that effect, the true view is, in my opinion, that the debtor is entitled to pay, and the creditor is bound to receive, the amount of the debt which has been

established, and that payment into Court is, in the circumstances, equivalent to payment to the creditor.

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PHILLIMORE J. I omitted to say, with regard to r. 165, that that rule might be wanted for the purpose of giving the petitioning creditor the costs of the petition. The petition must go back to the registrar for some purpose or other, because it is stayed until the decision has been given.

Appeal allowed.

F. O. R.

The petitioning creditors and the official receiver appealed from so much of the judgment as decided that Cook and Reed were bound to accept payment of their debts.

March 18. *The Solicitor-General* (*Sir Rufus Isaacs, K.C.*) and *Hansell*, for the appellants. In order to succeed on the appeal it is sufficient that the appellants should be right upon Reed's case; it is therefore not necessary to argue Cook's case, which is more complicated. The question is whether the debts of the petitioning creditors amount in the aggregate to 50*l*. The debtor disputed Reed's debt, but he paid into Court the full amount of the debt and the costs, as is required by the County Court Rules. The creditor is entitled to take the money out of Court, but the question is, is he bound to do so? It is settled law that when once a petition has been presented the debtor cannot defeat the petition by tendering the amount of the debt to the creditor. Then does the fact that the money is paid into Court make any difference? The Divisional Court accepted the general principle, but they held that if the money is paid into Court the creditor may take the money out without any risk of being defeated by any claim by the trustee in bankruptcy to have the money accounted for as being money received after notice of an act of bankruptcy. The order made under sub-s. 5 of s. 7 for a stay of proceedings was made in accordance with Form 18 of the Appendix to the Bankruptcy Rules, and the usual bond was entered into according to Form 19. But the point is not whether the creditor has security for the money, but whether

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the debt has in fact been paid. The Divisional Court were wrong in supposing that the payment of the money into Court prevented the application of the general principle that a creditor is not bound to accept payment of his debt after notice of an act of bankruptcy. There is no magic in payment into Court. The general principle is laid down in *In re Lowe* (1) and *Brook* v. *Emerson* (2); and see *Ponsford, Baker & Co.* v. *Union of London and Smith's Bank, Ld.* (3) If there is any real dispute the Court may have the question of the validity of the debt tried by the county court, but it requires that some security shall be given. That is the whole object of s. 7, sub-s. 5. If the view of the Divisional Court prevails, it will frequently be possible for a debtor to defeat a petition by a number of small creditors by disputing one of the debts and then paying the money into Court.

F. Dodd, for the respondent. In the circumstances the payment into Court was equivalent to the payment of the debt, for the reasons given by the Divisional Court. This case comes within the principle laid down by James L.J. in *In re Brigstocke* (4), which shews that the Court, in the exercise of its discretion, may decline to make a receiving order although the petitioning creditor refuses to accept payment of his debt and costs.

COZENS-HARDY M.R. This appeal raises an important point of bankruptcy practice, but, having heard the case argued, I am bound to say it is one upon which I feel no serious difficulty. The debtor was a man who owed a considerable number of small debts. There was a first petition, about which I say nothing except that it shews on the part of the debtor some skill in availing himself of the provisions of the Bankruptcy Act. Four creditors whose debts were of an aggregate amount of more than 50*l.* presented a petition. The debtor paid one of them, and, the creditor accepting the money, the amount owing to the creditors was thereby reduced to a sum below 50*l.* That petition was disposed of. Another petition was presented by

(1) 7 Morr. 25.
(2) (1906) 95 L. T. 821.
(3) [1906] 2 Ch. 444.
(4) (1877) 4 Ch. D. 348, 351.

five creditors whose aggregate debts, as lodged, would amount to more than 50*l.* Three admittedly were not disputed, and they amounted to 48*l.* 12*s.* With regard to the two remaining debts, Reed's and Cook's, the debtor swore an affidavit disputing them. If either of those debts was good the aggregate amounted to 50*l.* The act of bankruptcy, I should say, was not and could not be disputed. It was a good act of bankruptcy. There being a notice to dispute, the parties invoked the provisions of s. 7, sub-s. 5, of the Bankruptcy Act, a sub-section which it is plain must be read with the other provisions of that section. The scheme of s. 7 is this:— Sub-s. 1 provides that the petition must be verified by affidavit. Sub-s. 2 says: "At the hearing the Court shall require proof of the debt of the petitioning creditor, of the service of the petition, and of the act of bankruptcy, ... and if satisfied with the proof may make a receiving order in pursuance of the petition." Sub-s. 3 says: "If the Court is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the Court may dismiss the petition." The Court retains full power either to make a receiving order or to dismiss the petition. Then sub-s. 5 says: "Where the debtor appears on the petition and denies that he is indebted to the petitioner, or that he is indebted to such an amount as would justify the petitioner in presenting a petition against him, the Court, on such security (if any) being given as the Court may require for payment to the petitioner of any debt which may be established against him in due course of law, and of the costs of establishing the debt, may instead of dismissing the petition stay all proceedings on the petition for such time as may be required for trial of the question relating to the debt."

What happened here was that the Court made an order under that sub-section. I am dealing with Reed's case only. It made an order in pursuance of Form 18 of the Bankruptcy Act. All proceedings on the petition were stayed until after the Court in which the proceedings should be taken to establish the debt had come to a decision thereon, and the debtor was required to

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give a bond to the petitioning creditor Reed. According to the procedure of the county court, to which this matter was referred, a plaint had to be issued in which Reed was plaintiff and the debtor defendant. Instead of defending the action the debtor paid into Court the full amount claimed by Reed with 10*s.* costs, and then, when the petition came on, it having been only stayed until after the question of establishing the debt had been disposed of, Reed declined to take payment of the debt. He said: "I will not take the money out of Court. I could not safely accept a tender after and with notice of the proceedings after the act of bankruptcy, and I will not take the money." The registrar acceded to that view and said that Reed was not bound to take it; that the debt had not in fact been paid; that the aggregate petitioners had between them more than 50*l.* owing to them, and he made a receiving order. The Divisional Court have taken a contrary view, and have said, for some reasons which with the utmost respect I am unable to follow, that, although it be true that a petitioning creditor is not bound to accept a tender from the debtor of the debt in respect of which he petitions—that is established by abundant authority—yet, as the money was paid into Court, it was not only competent to him to take the money out and run the risk of having to pay it back, but it was an obligation or a duty upon him to take the money out of Court, and that it must be considered that he was no longer a creditor of the debtor, because the money was his, and was safe and available for the payment of his debt. I am unable to assent to that view. It seems to me that the case really falls within the principle of *Brook* v. *Emerson*.(1) I am not aware now, any more than I was aware then, of any authority for saying that a creditor can be required to accept payment of a debt when he is not willing to receive it after presentation of a bankruptcy petition.

Another point was raised, which was this: It is suggested that upon the establishment of the debt the bond which is required by the Court is to be taken in full discharge of all the rights of the petitioning creditor, and that the only right which the Court can have on a stay of proceedings is to dismiss the petition,

(1) 95 L. T. 821.

leaving the creditor to his remedy against the debtor and the sureties under the bond. There might have been some colour for that argument under the language of sub-s. 5 taken alone without reference to sub-s. 2 of the same section, but when you look at the rules, which have equal statutory force, it is quite plain from r. 165 that the Court retains full power over the petition, which is merely standing over. When it comes back the Court must deal with it according to the rights of the parties. If the debt has not been established, the Court will, of course, dismiss the petition. If it has been established, then the Court will deal with any other objections which may arise on the hearing of the petition, and subject thereto may make a receiving order. For these reasons I think it would be most dangerous to allow a scheme like this to succeed, since the result would be to render it almost impossible to obtain an adjudication in bankruptcy in the case of small creditors whose combined debts do not greatly exceed 50*l.* In my opinion the appeal must be allowed and the order of the registrar must be restored.

BUCKLEY L.J. Sect. 7 of the Bankruptcy Act, 1883, details the orders which may be made upon the hearing of a creditor's petition. Under sub-s. 2 the Court, if satisfied with the proof, may make a receiving order. Under sub-s. 3, if it is not satisfied with the proof, it may dismiss the petition. The sub-section with which we have to deal is sub-s. 5, and there is a difficulty, I confess, in its language. It uses the words "instead of dismissing the petition." That is to say, it contemplates that an event has arisen upon which the Court might, under the preceding provision, have dismissed the petition; it contemplates that the Court is not satisfied with the proof of the petitioning creditor's debt because the debtor denies he is indebted to the petitioner by such an affidavit as the Court thinks is not fictitious or evasive. But, contemplating that the Court might make an order in the debtor's favour dismissing the petition, it says the Court may require him to give security, and, on security being given, it may, "instead of dismissing the petition," stay proceedings for such time as may be required for trial of the question relating to the debt. The words "instead of

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dismissing the petition" do not, I think, mean exactly what at first sight they appear to mean. If the words were "instead of trying upon the petition the validity of the debt" there would be no difficulty. If I read the words as meaning, which I think they do mean, "may retain the petition," and so on, there is no difficulty. That is what I think is meant—that the Court may retain the petition, stay proceedings upon it, and direct the validity of the debt to be ascertained in an action.

That was the course which the Court took in this case. When the Court retains the petition it appears to me it obviously retains it with the power in some event of making an order upon it. It is not going to dismiss it in any event. In some events it is going to make an order upon it. If the trial of the issue results in finding there is no debt, of course the petition will be dismissed. If it results in finding that there is a debt, what is going to happen? The position of the petitioning creditor in that case is this. He has a pending petition which has been retained, and he has established that there is a debt; he also has a security, a security given by the debtor and two sureties. The view presented by the respondent to this appeal amounts to this, that in that state of things the petitioning creditor must look to his security and must abandon his right upon the petition. I do not think that follows. I think it plain from r. 165 that it does not follow. Where proceedings have been stayed, and the question has been decided in favour of the validity of the debt, the petitioning creditor may apply to fix a day on which further proceedings on the petition may be had; that is to say, further proceedings to ascertain whether an order shall be made or whether the petition shall be dismissed. The language of r. 165 is strongly in contrast to that of the next rule, 166, which is that where the question is decided against the validity of the debt an application shall be made for the dismissal of the petition. In that case dismissal is to follow. In the other case the question remains open whether upon the retained petition there is to be an order for dismissal or whether there is to be a receiving order made.

Here what happened was that the debtor paid into Court in the proceedings the amount of the debt. The Divisional

Court held in substance that that was equivalent to payment to and acceptance by the creditor. I cannot assent to that view. It appears to me that that was such a payment as the creditor either might or might not accept. If the debtor had come to him and tendered him his debt after the petition had been presented, he was entitled to refuse to receive it and to go on with the petition. In the same way, when the amount was paid into Court in the proceedings he was entitled to refuse to take it out of Court. But he had also the bond. The bond was one by which the debtor and his two sureties were bound to pay upon demand. The creditor was not bound to make that demand, and it was not for the Court, I think, to say to him, "You, having two remedies which are open to you, namely, (1.) this petition which the Court has retained, and (2.) the security which has been given to you under the statute, you are bound to take the latter and not the former." The creditor is entitled to say, as in any other case in which he is asked to accept payment, "I do not choose to accept payment from the debtor or from his sureties. I will not take it from the debtor because I may have to repay it, neither will I take it from the sureties. I elect to proceed upon the petition. I have established the validity of the debt. It is a good petition, and I am going to ask for an order on the petition." I think the intention of sub-s. 5 of s. 7 was to leave that in the volition of the creditor. He is not bound either to take payment from the debtor or to rely upon the liability of the sureties under the bond. I think, therefore, that the receiving order was rightly made and that this appeal ought to be allowed.

JOYCE J. It is with some diffidence that I express an opinion on this case; but it rather seems to me that the payment made in the action in the county court was under the circumstances a useless and futile proceeding. I am disposed to think that, for the purposes of the bankruptcy, all that the county court had to do with reference to the debt was to decide upon the validity of the debt, and no more, and that the Court could not have given judgment for payment while the bankruptcy proceedings were pending. It seems to me it had only to decide the

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question of the validity, and that, to my mind, is borne out by the provisions of r. 165, because, if the Court decides in favour of the validity of the debt, then r. 165 apparently contemplates the bankruptcy proceedings going on and the order of adjudication being made. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for the debtor: *Tatham, Oblein & Nash, for Ems, Great Yarmouth.*

Solicitors for the petitioning creditors in the Divisional Court: *Morris & Bristow, for Harmer, Ruddock & Son, Great Yarmouth.*

Solicitor for the petitioning creditors and the official receiver in the Court of Appeal: *Solicitor to the Board of Trade.*

H. B. H.

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[IN THE COURT OF APPEAL.]

MORRIS *v.* CARNARVON COUNTY COUNCIL.

Negligence—Local Education Authority—Provided School—Duty to maintain School—Dangerous Condition of Premises—Injury to Scholar—Liability of Authority to Action—Education Act, 1902 (2 *Edw.* 7, *c.* 42), *ss.* 5, 7—*Elementary Education Act*, 1870 (33 & 34 *Vict. c.* 75), *ss.* 18, 19.

The plaintiff, a girl aged seven, attended a public elementary school provided by the defendants, the local education authority for the district. This school had formerly belonged to a school board, and was transferred to the defendants upon the coming into operation of the Education Act, 1902. The only mode of entrance into and egress from a class-room in the school was by a doorway closed by a heavy swing door with a powerful spring, which door had been put up by the school board, the defendants' predecessors. The plaintiff, while leaving the class-room, was injured through this door closing on her fingers. The door was in good repair, and in the same condition as it was in when the school was taken over by the defendants. In an action brought by the plaintiff in respect of the injury sustained by her, the jury found that the door was not a suitable one for use by young children, when put up in the first instance, and that the defendants were guilty of negligence in allowing it to remain after the school was transferred to them:—

Held, following the decision in *Ching* v. *Surrey County Council*, ante,

p. 736, that, it being the duty of the defendants to keep the school premises in proper condition for the purposes of a school, they were responsible for a breach of duty in not discovering and remedying the improper construction of the door in question, when the school was transferred to them, and therefore the action was maintainable.

APPEAL from the judgment of a Divisional Court (Darling and Phillimore JJ.), reported ante, p. 159, on an appeal from a county court.

The action was in respect of personal injuries sustained by the plaintiff as after mentioned.

The facts are fully stated in the report of the case in the Court below, and may for the purposes of this report be briefly stated as follows:

The plaintiff, a girl of seven, attended a public elementary school provided by the defendants, the local education authority for the district. This school had formerly belonged to a school board, and was transferred to the defendants upon the coming into operation of the Education Act, 1902. In leaving a class-room in the school, the plaintiff had to pass through a doorway, which was closed by a heavy swing door with a powerful spring, and which formed the only means of entrance into and egress from the room. As she was so passing, the door swung back and crushed one of her fingers. The above-mentioned door was originally put up by the school board, the defendants' predecessors, and was in good repair, and in the same condition as when the school was taken over by the defendants. The jury found that the defendants were guilty of negligence in allowing the door to remain after the school had been transferred to them, and that the door was not a suitable one for an infant school when it was put up in the first instance. The county court judge gave judgment for the plaintiff. On appeal, the Divisional Court affirmed his judgment.

Artemus Jones (*Simon, K.C.*, with him), for the defendants. With the exception of the point decided by the Court of Appeal in *Ching* v. *Surrey County Council* (1), which was no longer open to the defendants, he used the same arguments as are mentioned

(1) Ante, p. 736.

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in the report of the case in the Court below, and he further contended that there was no evidence of negligence on the part of the defendants to go to the jury.

Boxall, K.C., and *R. A. Griffith*, for the plaintiff, were not called upon to argue.

VAUGHAN WILLIAMS L.J. In my opinion this appeal fails. It has been argued that, even if we thought that there was evidence of negligence in this case, yet there ought to be a new trial on the ground that the learned county court judge allowed an amendment which he ought not to have allowed, or on the ground that, if he rightly allowed it, he ought also to have given the defendants an opportunity of amending their defence, and calling witnesses with regard to the cause of action as altered by the amendment. Speaking for myself, I am of opinion that the particulars of claim as originally delivered completely cover the cause of action with which the jury dealt, and there was no necessity for any amendment; and therefore I do not propose to say anything on the question of the amendment. That being so, I will proceed to deal with the cause of action which, in my opinion, is very plainly expressed in the original particulars of claim. The injury to the plaintiff in this case was occasioned by a heavy door with a very strong spring. I do not think that it can be seriously argued that this door, as originally put up, was not a very improperly constructed door for the purposes of this school. It was very likely, if used by a young child, to occasion such an accident as happened in this case. It was urged for the defendants that this door was put up by their predecessors, the school board, and that, this being so, although the defendants permitted it to continue to be used in their time, they ought not to be held liable for negligence in respect of the accident which occurred through its existence. That argument amounts to saying that, if some structure of a dangerous character, like this door, was put up in the school at a time when the defendants' predecessors had the management of it, no duty rested on the defendants, after the school was transferred to them, to discover and remedy the dangerous nature of that structure. That is really the only way in which the

defendants' case can now be put. Before the decision in *Ching* v. *Surrey County Council* (1) it might have been argued that the duty which would have rested on the school board in respect of such a matter was not transferred by the Education Act, 1902, to the defendants, but they were only by that Act charged with the maintenance of the scholastic system in force in the school, and not with the maintenance and keeping efficient of the fabric of the school premises; but since the decision in that case it is impossible to put forward that contention. Under these circumstances the only question which we have to consider appears to me to be whether there was a duty on the part of the defendants to discover and remedy the danger occasioned by this door. I think that there clearly was such a duty imposed upon them. In my opinion there was evidence that this was obviously a dangerous door for the purposes of a school for young children, and, there being an obligation on the defendants to remove such a door, and substitute for it a safe mode of entrance into and egress from the class-room, the defendants failed to perform that obligation. For these reasons I think the appeal must be dismissed.

FLETCHER MOULTON L.J. I am of the same opinion. The grounds upon which an appeal from a county court can be brought are distinctly limited by statute; and it is not competent for an appellant to bring forward upon such an appeal, as grounds for interfering with the decision of the county court judge, matters of fact such as some of the matters which have been relied upon by the appellants in the present case. The case is a very simple one. A child's finger was injured in consequence of her attempting to open a door, which formed the only means of egress from a class-room in a school belonging to the defendants; and the action was brought in respect of that injury, charging the defendants with negligence in that the only method of access to and egress from the class-room provided by them was of a dangerous and unsuitable character for young children. That negligence was expressed in well chosen and unambiguous terms by the particulars of claim, as originally

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Fletcher Moulton L.J.

delivered. The question whether the defendants had been guilty of negligence as alleged was tried and determined by the jury adversely to the defendants, and there was abundant evidence to justify the jury in finding that the door in question was an improper door for the purposes of an infants' class-room. Particulars as to the weight of the door were given in evidence, and the spring of the door was produced; and upon this evidence the jury, from their experience of children and doors in ordinary life, were entitled to find that there was negligence on the part of the defendants in allowing the door to remain in use in the school. The learned county court judge seems for some reason to have thought it necessary to ask the jury whether there was negligence on the part of the school board in putting up the door years before. I do not see any ground for putting that question to them; but it was put, and the jury found that there was such negligence. The judge gave judgment for the plaintiff, and we have to consider whether there is any ground for interfering with his judgment. The only question seems to me to be whether there was a duty resting on the defendants to take care day by day that the door which had to be used by the children, as being the only means of entrance to and egress from the class-room, was not an improper door for that purpose. To my mind there can only be one answer to that question. The Education Act, 1902, conferred upon the defendants all the powers and imposed upon them all the duties which were originally conferred and imposed upon the school board. It appears to me clear that it was the duty of the school board not to have in a school provided by them a door which, being one that the children in the school must use, was a dangerous door for the purpose of being used by them. For these reasons I think the judgment of the county court judge was correct.

FARWELL L.J. I am of the same opinion. The case of *Ching* v. *Surrey County Council* (1) has settled, contrary to the dictum of Phillimore J. in the Court below in the present case, that the duty to maintain the school imposed upon the local education

(1) Ante, p. 736.

authority by the Education Act, 1902, is not confined to the maintenance of the school as an educational institution, but extends to keeping the school and premises belonging thereto in a proper condition. The jury in the present case have found that the defendants were guilty of negligence in allowing this door to remain in use in the school. I think that there was clear evidence of negligence on the part of the defendants in this respect. Having regard to the evidence as to the weight of the door, and the strength of the spring, it was a door which it was competent for the jury to find to be a dangerous one for use by young children. The combined effect of the Education Act, 1902, and the Elementary Education Act, 1870, is to throw upon the education authority the duty of providing, maintaining, and keeping efficient all necessary provided schools. It is beside the mark to say that the defendants kept the school as they found it when they took it over from the school board. It was their business to provide and maintain proper school premises which would not be dangerous to the children who were to be educated in them. I do not think that there was any occasion to go, as the county court judge did, into the question whether the school board were negligent in originally erecting the door in question.

Upon the findings of fact by the jury, I do not see any ground for interfering with the judgment of the county court judge on the law. I agree, therefore, with the result of the judgment given by the learned judges in the Divisional Court, but I wish to guard myself against being supposed to agree with all the reasons given by them for that judgment.

Appeal dismissed.

Solicitors for plaintiff: *Peacock & Goddard, for S. R. Dew & Co., Bangor.*

Solicitors for defendants: *Huntley & Son, for Davies & Davies, Carnarvon.*

E. L.

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April 11.

[IN THE COURT OF APPEAL.]

MOSS *v.* ELPHICK.

Partnership—Validity of Notice of Dissolution—Partnership determinable "by mutual arrangement only"—Partnership Act, 1890 (53 & 54 *Vict. c.* 39), *ss.* 26, 32.

By s. 26, sub-s. 1, of the Partnership Act, 1890, where "no fixed term" has been agreed upon for the duration of the partnership, any partner may determine it at any time by notice.

By s. 32, "subject to any agreement between the partners," a partnership "for an undefined time" may be dissolved by notice.

An agreement of partnership was entered into between two persons by which it was provided that the partnership should be terminated "by mutual arrangement only":—

Held, affirming the judgment of a Divisional Court, that one of the partners could not determine the partnership by notice against the will of the other partner.

Appeal from the judgment of a Divisional Court (Darling J. and Pickford J.) upon an appeal from a judgment of the judge of the Sussex County Court sitting at Brighton.

The facts are fully stated in the report of the case in the Divisional Court (1), but for the purposes of this report they may briefly be stated as follows. By an agreement in writing dated August 14, 1907, the plaintiff and defendant became partners in a tobacconist's business carried on in Brighton. Clause 4 of that agreement was in the following terms:—"This agreement shall be terminated by mutual arrangement only." On March 2, 1909, the plaintiff gave the defendant a fortnight's notice in writing of his intention to terminate the partnership. The defendant contended that the notice was inoperative upon the ground that by clause 4 of the partnership agreement the partnership could only be determined by mutual consent. The plaintiff thereupon commenced the action in the county court, claiming (inter alia) a receiver and manager of the partnership business, and that the affairs thereof might be wound up by the Court.

The county court judge gave judgment for the defendant upon the ground that the partnership could only be terminated by mutual consent of the partners.

(1) Ante, p. 465.

The Divisional Court affirmed the judgment of the county court judge. (1)

H. S. Bompas, for the plaintiff. This case comes within s. 26, sub-s. 1, of the Partnership Act, 1890. The expression "fixed term" as used in that sub-section must mean a definite, ascertained period of time, and therefore, where no such period of time is fixed for the duration of the partnership, as is the case here, the sub-section applies, and either of the partners can determine the partnership by notice at any time. The construction put upon the Act by the Divisional Court involves the result that s. 26, sub-s. 1, and s. 32 to some extent overlap, and cover the same ground, and to that extent their provisions are not consistent, a construction which, according to the ordinary rules of construction, is prima facie inadmissible. The words "subject to any agreement between the partners" in s. 32 may be construed as referring to agreements between the partners subsequent to the original partnership agreement.

Rowand Harker, for the defendant, was not called upon to argue.

Vaughan Williams L.J. The arguments of the plaintiff's counsel have not convinced me that it was the intention of the Act that persons becoming partners should not be able, if they wished, to provide in the agreement of partnership that the partnership should not be at will, but should be determinable only by mutual agreement. In a case like the present, where a considerable sum has been paid by one of the partners on entering into the partnership, I cannot think that it could be

(1) By the Partnership Act, 1890, s. 26, sub-s. 1, "Where no fixed term has been agreed upon for the duration of the partnership, any partner may determine the partnership at any time on giving notice of his intention so to do to all the other partners." By s. 32 of the same Act, "Subject to any agreement between the partners, a partnership is dissolved— . . . . (c) if entered into for an undefined time, by any partner giving notice to the other or others of his intention to dissolve the partnership. In the last mentioned case the partnership is dissolved as from the date mentioned in the notice as the date of dissolution, or, if no date is so mentioned, as from the date of the communication of the notice."

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in the contemplation of the parties that the partnership should be determinable at any time by a mere notice given by one of the partners, and it was obviously reasonable that the agreement should be on the terms expressed in clause 4, which provides that "this agreement shall be terminated by mutual arrangement only." It was urged upon us that, if we take the view that the partnership is only so determinable notwithstanding s. 26, sub-s. 1, of the Partnership Act, 1890, we shall be compelled to assent to the proposition that in s. 32, the provisions of which are qualified by the words "subject to any agreement between the partners," something which has already been provided for in s. 26, sub-s. 1, is again provided for in a somewhat different manner, namely, subject to a qualification not contained in s. 26, sub-s. 1. Even on the assumption that this is so, I am of opinion that, although as a general rule the presumption would be against such an overlapping of provisions in a statute, in this case it is impossible to come to the conclusion that it was intended by the Act to forbid persons entering into partnership from making such a stipulation as that contained in clause 4 of the agreement in this case. I think that the judgment of the Divisional Court was right and must be affirmed.

Fletcher Moulton L.J. I am of the same opinion. I do not think that it was intended by the Partnership Act, 1890, to limit the power of persons to enter into an agreement of partnership upon such terms with regard to the duration of the partnership as they might think fit. The Act was intended to deal partly with matters of procedure, and partly with the implications which arise from the relation of partners as regards the ordinary incidents of partnership business. That view appears to me to be supported by the language of ss. 32 and 33 of the Act, which shews that the incidents therein stated to attach to partnership are to be "subject to any agreement between the partners," which I understand to mean any specific agreement as to the matters mentioned in those sections contained in the partnership agreement. The only difficulty arises from the terms of s. 26, sub-s. 1, which provides that, "where no fixed term has been agreed upon for the duration of the partnership,

any partner may determine the partnership at any time by giving notice of his intention so to do to all the other partners." It is argued that this provision refers to all cases in which a definite period of time has not been fixed by the agreement of partnership for the duration of the partnership. That does not appear to me to be the true meaning of the sub-section. I think that it refers only to cases where the partnership agreement is silent as to the duration of the partnership; that it is not meant to nullify any provision which the parties have chosen to make as to the duration of the partnership, but only to take effect where they have made no such provision at all. In this case it is provided that "this agreement shall be terminated by mutual arrangement only"; or, in other words, that the partnership shall, in effect, be for the joint lives of the parties, unless terminated by mutual agreement. There is, therefore, a specific provision as to the duration of the partnership in the partnership agreement; and it is in that sense a partnership for a fixed, *i.e.*, defined, term, and consequently, in my opinion, s. 26, sub-s. 1, does not apply to the case; the ground upon which I come to that conclusion being that s. 26, sub-s. 1, was not intended to limit freedom of contract with regard to the duration of a partnership, but was meant only to apply to cases where the parties have made no provision as to its duration in their agreement of partnership.

Farwell L.J. I am of the same opinion. The construction of the Act contended for by the plaintiff's counsel involves the conclusion that the insertion of a bargain to determine a partnership by mutual agreement only is forbidden—a conclusion so extravagant that nothing short of express unambiguous words would induce me to adopt it. In my opinion s. 26, sub-s. 1, applies to partnerships at will only. I agree with the statement contained in Lindley on Partnership, 7th ed., p. 142, where, after quoting s. 26, sub-s. 1, of the Partnership Act, 1890, the learned author says, "In other words, the result of a contract of partnership is a partnership at will, unless some agreement to the contrary can be proved." It is impossible in this case to say that by the terms of the partnership agreement the partnership

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was "at will," because that means that it is determinable at the will of either of the parties: here it is expressly provided that it shall be determined only by the mutual consent of both parties. I am of opinion that this case does not come within s. 26, sub-s. 1, as being a case in which no fixed term has been agreed upon for the duration of the partnership. The effect of the agreement is that the partnership is to endure for the joint lives of the partners. If it were so expressed, it would be unnecessary to add the words "unless it be determined by mutual agreement." Here the parties have not said that the partnership is to be for their joint lives, but have said that it is to be determinable "by mutual arrangement only," but the effect is the same. Either the case does not come within s. 26, sub-s. 1, or, if it does, I think that the words "subject to any agreement between the partners" in s. 32 produce the same result.

Appeal dismissed.

Solicitors for plaintiff: *Peacock & Goddard, for Gaby & Stapylton-Smith, Hastings.*

Solicitors for defendant: *Langham, Son & Douglas, for Savery, Brighton.*

E. L.

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THE KING *v.* THE JUSTICES FOR THE COUNTY OF GLAMORGAN. *Ex parte* DAVIES AND OTHERS.

Licensing Acts — Compensation Levy — Charges imposed by Compensation Authority for County—County Borough constituted before Charges paid—Separate Commission of the Peace—Charges in respect of Licensed Premises in Borough—Right of Compensation Authority for Borough—Licensing Act, 1904 (4 *Edw.* 7, *c.* 23), *ss.* 3, 8.

The quarter sessions for a county as the compensation authority imposed, under s. 3, sub-s. 1, of the Licensing Act, 1904, at the Epiphany sessions, 1908, charges for the ensuing year in respect of all existing on licences renewed in respect of premises within their area. At that date a borough was within the area of the quarter sessions for the county, but it was constituted a county borough as from April 1, 1908, and in July following a separate commission of the peace was granted to it. In October, 1908, the Commissioners of Inland Revenue, under s. 3, sub-s. 2, of the Act, collected the charges imposed by the quarter sessions for the county at the preceding Epiphany sessions, including the charges in respect of licensed premises within the borough, and paid over the amount produced by the charges within the borough to the compensation authority thereof, and the amount produced by the charges in respect of licensed premises in the rest of the county to the compensation authority for the county. The latter authority claimed to be entitled to the amount produced by the charges in respect of premises within the borough as being the authority which had imposed those charges:—

Held, that by virtue of s. 3, sub-s. 2, and s. 8 the compensation authority for the borough were entitled to be paid the amount produced by those charges notwithstanding that they had been imposed by the compensation authority for the county.

THESE two cases were heard together.

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Rule calling upon the Commissioners of Inland Revenue to shew cause why a writ of mandamus should not issue commanding them to hand over to the treasurer of the compensation authority for the county of Glamorgan, in accordance with the Licensing Act, 1904, and the rules made thereunder, the sum of 3000*l.*, being part of the levy made by the above-named

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compensation authority under s. 3 of the Act at the Epiphany quarter sessions, 1908.

The quarter sessions for the county of Glamorgan, at the Epiphany sessions, 1908, imposed for the year ending April 5, 1909, charges under s. 3, sub-s. 1, of the Licensing Act, 1904, in respect of all existing on licences renewed in respect of premises within their area at the maximum rates allowed by the Act. At that date the borough of Merthyr Tydfil was within the area of the quarter sessions for the county of Glamorgan. By a provisional order made by the Local Government Board on May 2, 1907, in pursuance of ss. 54 and 59 of the Local Government Act, 1888, and entitled the County Borough of Merthyr Tydfil Order, 1907, which was confirmed by the Local Government Board's Provisional Orders Confirmation (No. 8) Act, 1907 (7 Edw. 7, c. clviii.), the borough of Merthyr Tydfil was constituted a county borough as from April 1, 1908. By art. 5 of the order, "(1.) An equitable adjustment shall be made between the administrative county"—that is, the county of Glamorgan—"and the borough respecting the proceeds of the charges imposed in pursuance of s. 3 of the Licensing Act, 1904, by the compensation authority (as defined by the Licensing Rules, 1904) for the administrative county. (2.) Such adjustment shall be made by agreement between the compensation authority for the administrative county and the compensation authority for the borough within twelve months from the commencement of this order"—April 1, 1908—"or in default of agreement by an arbitrator appointed by the Secretary of State." Upon July 28, 1908, a separate commission of the peace was granted to the county borough of Merthyr Tydfil.

Upon October 10, 1908, the Commissioners of Inland Revenue, under s. 3, sub-s. 2, of the Licensing Act, 1904 (1), were paid the

(1) 4 Edw. 7, c. 23, s. 3, sub-s. 1: "Quarter sessions shall in each year, unless they certify to the Secretary of State that it is unnecessary to do so in any year, for the purposes of this Act impose, in respect of all existing on licences renewed in respect of premises within their area, charges at rates not exceeding and graduated in the same proportion as the rates shewn in the scale of maximum charges set out in the First Schedule to this Act."

Sub-s. 2: "Charges payable under this section in respect of any licence shall be levied and paid together

charges imposed by the quarter sessions for the county of Glamorgan at the Epiphany sessions, 1908, including those imposed in respect of the licensed premises within the borough of Merthyr Tydfil, and out of the sum so paid to them the Commissioners in November, 1908, paid 3000*l.*, the amount of the charges levied in respect of licensed premises within the county borough of Merthyr Tydfil (with the exception of a small sum kept in hand to meet possible repayments), to the treasurer of the Merthyr Tydfil compensation authority, and the rest of the sum was paid to the treasurer of the compensation authority for the county of Glamorgan.

The compensation authority for the county borough of Merthyr Tydfil did not impose any charges in 1908 under s. 3, sub-s. 1, of the Licensing Act, 1904, in respect of licensed premises within their area, inasmuch as charges had already been imposed by the compensation authority for the county. No equitable adjustment as provided for in art. 5 (1.) of the County Borough of Merthyr Tydfil Order, 1907, had been made.

The quarter sessions for the county of Glamorgan, acting as the compensation authority for the county under the Licensing Act, 1904, demanded from the Commissioners of Inland Revenue payment of the above-mentioned sum of 3000*l.* under s. 3, sub-s. 2, of the Licensing Act, 1904, and, upon the Commissioners refusing to make the payment, the compensation authority on May 25, 1909, obtained the above rule nisi for a mandamus.

Sir S. T. Evans, S.-G., and *W. Finlay*, for the Commissioners of Inland Revenue, shewed cause. Mandamus will not lie to

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with and as part of the duties on the corresponding Excise licence, but a separate account shall be kept by the Commissioners of Inland Revenue of the amount produced by those charges in the area of any quarter sessions, and that amount shall in each year be paid over to that quarter sessions in accordance with rules made by the Treasury for the purpose."

Sect. 8: "(1.) The area of quarter sessions for a county shall for the purposes of this Act include any borough (not being a county borough) or any part thereof which is locally situated in that county.

"(2.) This Act shall apply to a county borough as if it were a county, with the substitution for quarter sessions of the whole body of justices acting in and for the borough."

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the Commissioners of Inland Revenue, but the Commissioners waive that objection for the purposes of this case. The charges imposed by the quarter sessions for the county of Glamorgan at the Epiphany sessions, 1908, were in respect of the year from April 5, 1908, to April 5, 1909: *Horton* v. *Penn.* (1) The 3000*l.*, which was paid to the Commissioners of Inland Revenue in October, 1908, was properly paid by them to the compensation authority for the borough of Merthyr Tydfil. By s. 3, sub-s. 2, of the Licensing Act, 1904, the charges imposed upon existing on licences under sub-s. 1 shall be levied and paid together with and as part of the duties on the corresponding Excise licence, that is to say, the charges are to be paid on October 10 in each year, but a separate account shall be kept by the Commissioners of Inland Revenue of the amount produced by those charges in the area of any quarter sessions, and that amount shall in each year be paid over to that quarter sessions. "The amount produced by those charges in the area of any quarter sessions" has to be paid over to "that quarter sessions." The date when the amount produced by the charges was paid, namely, October 10, 1908, is the material date to consider, and at that date the borough of Merthyr Tydfil was a county borough with a separate commission of the peace. By s. 8, sub-s. 1, of the Act a county borough is excluded from the area of quarter sessions for a county, and by sub-s. 2 the Act is to apply to a county borough as if it were a county, with the substitution for quarter sessions of the whole body of justices acting in and for the borough. The effect of those provisions is that, in the case of a county borough, the compensation levy must be paid to the whole body of justices acting in and for the borough, that is to say, the body which is defined by r. 2 of the Licensing Rules, 1904, as the compensation authority for the borough. The mere fact that the quarter sessions for the county imposed the charges does not entitle them to payment of the amount produced by those charges, if they have ceased at the time when the charges are paid to be the compensation authority for the area within which the charges are levied. The Commissioners of Inland Revenue therefore rightly paid the 3000*l.* to the compensation authority

(1) [1907] 1 K. B. 561.

for Merthyr Tydfil and any adjustment of that sum as between Merthyr Tydfil and the county must be made under art. 5 of the provisional order of 1907.

Secondly, the Court will not grant a mandamus as there is another remedy open, namely, by applying for an equitable adjustment under art. 5 of the provisional order: *In re Nathan.* (1)

B. Francis-Williams, K.C., and *J. G. Pease* also shewed cause on behalf of the compensation authority for Merthyr Tydfil.

Danckwerts, K.C., and *R. E. L. Vaughan Williams*, in support of the rule. Between April 1 and July 28, 1908, there was no separate commission of the peace for the borough of Merthyr Tydfil, and therefore during that period the justices for the county continued to act as justices in and for the borough. Since the grant of the separate commission of the peace to the borough the justices appointed to act in and for the borough are the compensation authority for the borough. Sect. 3, sub-s. 1, of the Licensing Act, 1904, directs the quarter sessions to impose certain charges "in respect of all existing on licences renewed" within their area. The charges are imposed in respect of existing on licences and become payable to the authority which imposed them. By sub-s. 2, as a piece of machinery, the charges are to be paid together with and as part of the duties on the corresponding Excise licence, namely, on October 10 following, to the Commissioners of Inland Revenue, who are to keep an account of the amount produced by those charges in the area of any quarter sessions, and the Commissioners are directed to pay that amount to that quarter sessions. "The area of any quarter sessions" and "that quarter sessions" refer to the quarter sessions which imposed the charges. The expression "quarter sessions" is defined in s. 9, sub-s. 4, as meaning, as respects a county, the quarter sessions for that county. The material date to look at is the date when the charges are imposed. The Act is framed upon the assumption that no change takes place between the date when the charges are imposed and the date when they are paid over. Therefore the quarter sessions referred to in s. 3, sub-ss. 1 and 2, are the same body. Sub-s. 2 is merely a section dealing with the collection of the money, and does not

(1) (1884) 12 Q. B. D. 461.

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deal with the right to the money; the right to the money must be determined as at the date when the charges are imposed, and the fact that the Commissioners of Inland Revenue are the persons who have to collect the charges, instead of the quarter sessions which imposed them, cannot alter the destination of the money. No doubt, by virtue of s. 8, sub-s. 2, the quarter sessions for the county of Glamorgan cannot now impose charges under s. 3 in respect of licensed houses within the borough of Merthyr Tydfil, the persons to impose those charges being the compensation authority for the borough, namely, the whole body of justices acting in and for the borough. The Merthyr Tydfil justices, therefore, are not entitled to be paid this sum of 3000*l.*, and if they have any claim upon it they must apply to have an equitable adjustment made under art. 5 of the provisional order. The Commissioners of Inland Revenue have nothing to do with an adjustment under that article; their duty is to pay the money to the compensation authority for the county which imposed the charges, and the rule should be made absolute.

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These were four rules, all in similar form, the first rule, which may be taken as an example of them all, being directed to the justices in and for the county of Glamorgan acting as the compensation authority for the county to shew cause why a writ of mandamus should not issue commanding them to fix a day for the payment of and to pay or cause to be paid to the applicant Elizabeth Ann Davies, being a person along with others entitled to compensation upon the refusal to renew the licence for the King's Head Inn, in the borough of Merthyr Tydfil, the sum of 477*l.* 10*s.*, her share as ascertained by the said compensation authority of the compensation money agreed and approved as the compensation payable on the refusal to renew such licence.

The facts, as appearing from the affidavits, in addition to those already stated in the rule against the Commissioners of Inland Revenue, may be stated shortly as follows: The question of the renewal of the licences (five in number) the subject-matter of these rules was at the adjourned general annual licensing

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meeting in March, 1907, referred under s. 1 of the Licensing Act, 1904, by the justices of the licensing district of Caerphilly Higher, in the county of Glamorgan, of which licensing district the borough of Merthyr Tydfil formed part, to the quarter sessions for the county of Glamorgan as the compensation authority, a provisional renewal of the licences being granted by the licensing justices. The licensed premises were all within the borough of Merthyr Tydfil. Upon July 1, 1907, the renewals were refused by the compensation authority, and on August 13, 1907, the amount of the compensation to be paid was agreed to and approved by the compensation authority, and the shares were settled among the persons interested in the licensed premises. Towards the end of 1907 the compensation authority for the county, who had at the beginning of the year imposed, under s. 3, sub-s. 1, of the Act, in respect of existing on licences renewed, charges at the maximum rates, paid the compensation in respect of premises within the county (other than those within the borough of Merthyr Tydfil) the licences of which had been refused renewal in that year, but paid no compensation for the non-renewal in that year of any of the licences in respect of premises in the borough of Merthyr Tydfil. At the general annual licensing meeting in 1908 a further provisional renewal was granted by the licensing justices of Caerphilly Higher of the above-mentioned licences in Merthyr Tydfil whose renewal had been refused in 1907, the compensation money not having been paid; and in 1908 no further licences were refused renewal in Merthyr Tydfil. Towards the end of 1908 the compensation authority for the county paid the compensation for the non-renewal in that year of some of the licences in respect of premises within the county, but paid no compensation in respect of any of the licensed premises in Merthyr Tydfil the renewal of whose licences had been refused in 1907. At the general annual licensing meeting for the borough of Merthyr Tydfil in February, 1909, the licensing justices for the borough granted a further provisional renewal of the above-mentioned licences in the borough upon condition that the licensees should take proceedings against the compensation authority for the county to enforce payment of the

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compensation money in respect of the licences. The licensees accordingly applied for and obtained these rules.

Danckwerts, K.C., and *R. E. L. Vaughan Williams*, for the justices, shewed cause. The applicants for the rules have not shewn that the compensation authority for the county have any money in their hands wherewith to pay the compensation claimed. The most that can be said is that they have paid compensation for some of the licences refused in 1908 before paying the compensation for the Merthyr Tydfil licences the renewals of which were refused in 1907. The compensation authority have a discretion as to the order in which compensation shall be paid, and they considered that, as the 3000*l.*, the amount produced by the charges on licences in Merthyr Tydfil, was not paid to them, but to the compensation authority for Merthyr Tydfil, it was fairer to pay the compensation for the licences whose renewal was refused in the rest of the county. Rule 34 of the Licensing Rules, 1904, provides that "as soon as may be" after the shares of the compensation money have been settled the compensation authority shall send notice to the persons entitled to compensation that the compensation money is payable, and fix a day, not less than two weeks nor more than six weeks after the date of the notice, for the payment of the amount of the respective shares in the compensation money. The compensation authority have therefore a discretion as to whether one house shall be closed before another. They have not refused to pay, and therefore a mandamus will not be granted: *Rex* v. *Brecknock and Abergavenny Canal Co.* (1) The compensation authority are willing to pay when they have the money with which to pay. The rules ought therefore to be discharged.

J. E. Bankes, K.C., and *W. Mackenzie*, in support of the rules, were not called upon.

LORD ALVERSTONE C.J. I propose to state the dates which seem to me to be material for the purpose of deciding both these cases. At the general annual licensing meeting in 1907 for the division of Caerphilly Higher, which included

(1) (1835) 3 Ad. & E. 217.

the borough of Merthyr Tydfil, the question of the renewal of the licences of—so far as material to this case—five licensed houses in the borough of Merthyr Tydfil was referred under s. 1 of the Licensing Act, 1904, to the quarter sessions for the county of Glamorgan as the compensation authority, and the quarter sessions upon July 1, 1907, refused the renewal of the licences. The compensation in respect of the non-renewal of those five licences was assessed on August 13, 1907. If matters had remained as they were at that date, and if Merthyr Tydfil had not been subsequently constituted a county borough, but had remained a part of the county of Glamorgan, no question would have arisen. When and in so far as the compensation fund was sufficient for the purpose, it would have been applied in payment of the ascertained claims of those who were entitled to compensation, and in ordinary circumstances the order of payment would, no doubt, have been regulated by the date of the refusal of the renewal. I am inclined to think, however, that the compensation authority have a discretion as to the order of payment, where the fund is not sufficient to pay all. It may, for instance, be thought advisable to close a particular house at once, instead of allowing it to wait its turn, and in such a case I should think that there must be a discretion as to the order of payment. That being the state of matters, the quarter sessions for the county of Glamorgan, at the Epiphany sessions, 1908, acting under s. 3, sub-s. 1, of the Licensing Act, 1904, imposed in respect of all existing on licences in the county the maximum charges set forth in Sched. I. to the Act. Before that date a provisional order, confirmed by an Act of 1907, had been obtained which constituted the borough of Merthyr Tydfil a county borough as from April 1, 1908; and on July 28 of that year a separate commission of the peace was granted to the county borough. The Commissioners of Inland Revenue, having collected the sum of 3000*l.* in October, 1908, on account of the compensation charges imposed in respect of licensed premises in the borough of Merthyr Tydfil, paid over that sum in November of that year to the compensation authority for Merthyr Tydfil. Therefore neither in 1908 nor since that year have the compensation authority for the county of Glamorgan received any

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payments into the compensation fund in respect of charges upon licences in the borough of Merthyr Tydfil, though they have continued to receive payments in respect of charges upon licences in other parts of the county. The compensation authority for the county made certain payments in respect of the compensation for licences the renewals of which had been refused in 1907 and 1908, with the result that, when the rules nisi in the present cases were moved for, the compensation in respect of the licences the renewals of which had been refused in 1907, with the exception of the Merthyr Tydfil licences, and the compensation in respect of some of the licences refused in 1908, had been paid. The view taken by the compensation authority for the county, which I can quite understand, was that, inasmuch as no compensation money had been received by them from the Merthyr Tydfil area, they would not pay compensation for the Merthyr Tydfil houses. If that were a right view and a proper exercise of their discretion we should not grant this mandamus; but it involves this, that the compensation money coming from the licences in the Merthyr Tydfil area may for this purpose be treated as something separate and apart from the rest of the money in the compensation fund which has come to the hands of the compensation authority for the county. The only other matter to which I wish to refer before proceeding to deal with the first of these rules is that the provisional order of 1907, in addition to providing that on and after April 1, 1908, Merthyr Tydfil should become a county borough, contained a provision that an equitable adjustment should be made between the administrative county of Glamorgan and the new county borough respecting the proceeds of the charges imposed on existing on licences in pursuance of s. 3 of the Licensing Act, 1904, by the compensation authority for the administrative county, such adjustment to be made by agreement or failing agreement by arbitration. Therefore it is clear that, if we hold that the 3000*l.* was rightly paid to the compensation authority for Merthyr Tydfil, there may have to be an adjustment which will involve the question as to how much, if any, of this 3000*l.* the compensation authority for the county are entitled to in respect of licences the renewals of which were refused before April 1, 1908, and for which they have to pay compensation.

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The first rule raises this point. It is contended on behalf of the compensation authority for the county of Glamorgan that this 3000*l.* ought not to be paid over to the compensation authority for the borough of Merthyr Tydfil, but that, inasmuch as the compensation authority for the county at the Epiphany sessions, 1908, imposed the charges upon existing licences within their area, the money which was ultimately received as the proceeds of those charges must be paid to them. I am unable to follow that argument. No doubt, if the condition of things had remained as it was at the beginning of 1908, the money would have been paid to the compensation authority for the county, not because they had fixed it, but because they were the persons who were entitled under the Licensing Act, 1904, to receive it and to deal with it; but it does not necessarily follow that, because some person has to impose the charge, that same person is entitled to receive and to deal with the amount produced by the charge. In order to see who is entitled to this sum of 3000*l.* it is necessary to construe ss. 3 and 8 of the Licensing Act, 1904. Sects. 1 and 2 having provided for a reference to quarter sessions of the question of the refusal to renew existing on licences on certain grounds and the payment of compensation in case of non-renewal, s. 3, sub-s. 1, enacts that "quarter sessions shall in each year, unless they certify to the Secretary of State that it is unnecessary to do so in any year, for the purposes of this Act impose, in respect of all existing on licences renewed in respect of premises within their area, charges at rates not exceeding and graduated in the same proportion as the rates shewn in the scale of maximum charges set out in the First Schedule to this Act." That is simply an enactment requiring charges upon a certain scale to be imposed. By sub-s. 2, "Charges payable under this section in respect of any licence shall be levied and paid together with and as part of the duties on the corresponding Excise licence, but a separate account shall be kept by the Commissioners of Inland Revenue of the amount produced by those charges in the area of any quarter sessions, and that amount shall in each year be paid over to that quarter sessions in accordance with rules made by the Treasury for the purpose." So far the matter is

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clear. The quarter sessions for the county of Glamorgan would in ordinary circumstances have been entitled, as I have already said, to the amount produced by the charges imposed by them upon the existing licences within their area, not because they had imposed the charges, but because the sub-section directs the Commissioners of Inland Revenue, who collect the amount of the charges together with and as part of the Excise duties, to keep an account of the amount so collected and to pay it over to them.

Lord Alverstone C.J.

I come now to the difficulty with which we have to deal. Sect. 8 is a compendious enactment purporting to apply the provisions of the Act to a county borough as if it were a county, and the question which we have to determine is whether s. 3, sub-s. 2, when read with s. 8, has the effect of justifying the payment of this sum of money to the new county borough of Merthyr Tydfil. That section enacts that "(1.) The area of quarter sessions for a county shall for the purposes of this Act include any borough (not being a county borough) or any part thereof which is locally situated in that county. (2.) This Act shall apply to a county borough as if it were a county, with the substitution for quarter sessions of the whole body of justices acting in and for the borough." A difficult question might have arisen as to who were the justices acting in and for the borough of Merthyr Tydfil for the purposes of the Licensing Act, 1904, from April 1, 1908, to July 28, 1908, when a separate commission of the peace was granted to the borough. It may be that the justices of the county would have acted in and for the borough. I shall not endeavour to solve that difficulty, because it is not necessary to do so. When one has to apply the provisions of the Act to a county borough as if it were a county, it is difficult to see why the provisions of s. 3 should not apply in their entirety. Upon July 28, 1908, a separate commission of the peace was granted to the borough of Merthyr Tydfil, and the justices acting in and for the borough succeeded to the jurisdiction over the area of the county borough of the justices for the county. That area was at that date subject to an order under s. 3, sub-s. 1, of the Licensing Act, 1904, imposing charges at the maximum rate upon all existing on licences therein. When

in the following October the charges imposed upon the licences within that area were paid to the Commissioners of Inland Revenue, I cannot see any reason why the Commissioners should not be bound to pay over the money under the provisions of s. 3, sub-s. 2, to the persons therein stated to be entitled to receive it, namely, the compensation authority for the borough—that is to say, the whole body of justices acting in and for the borough, who are by virtue of s. 8, sub-s. 2, substituted for the quarter sessions. It is not disputed that in all subsequent years the justices for the county borough would be, for the purpose of s. 3, sub-s. 2, the persons entitled to receive all payments of compensation money, but it is said that that is so because they are the persons who are the authority to impose the charges under sub-s. 1. In my opinion that is not the reason. The reason is because sub-s. 2 directs that the money is to be paid over to them. I cannot think that, where at the time when the money has to be paid over there is a county borough in existence with a separate commission of the peace, the words of s. 3, sub-s. 2, as read in the light of s. 8, are not to be given their ordinary meaning because the authority which imposed the charges was the quarter sessions for the county, which was the only authority at the time which could have imposed the charges. The words of s. 3, sub-s. 2, "shall be levied and paid together with" the Excise licence duties, point to the time when the charges are received by the Commissioners, who are to keep a separate account of the amount produced by the charges in the area, and that amount is to be paid to the quarter sessions having the control over that area, that is to say, in a county borough to the whole body of justices acting in and for the borough. In my opinion, therefore, the obligation on the part of the Commissioners of Inland Revenue to pay and the right of the county borough of Merthyr Tydfil to receive this 3000*l.* are established. The Commissioners of Inland Revenue were justified in paying over this money to the compensation authority for the borough of Merthyr Tydfil, and the rule must be discharged.

With regard to the four other rules, the applicants say that the compensation money payable in respect of their licences

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was assessed in August, 1907, and that the authority which refused the renewal of the licences and approved the amount of compensation, and which had control of the compensation fund at that date, namely, the compensation authority for the county of Glamorgan, are the persons who are under an obligation to pay them the compensation money; and they ask for a mandamus to compel that authority to pay. If the rules are made absolute, and if the respondents think that they can successfully establish that they have not the money and therefore should not be ordered to pay, they can raise that matter in a return to the rules. So far as I can see upon the materials before us there is evidence that the compensation authority for the county have had ample funds in their hands wherewith to pay the compensation money, and, so far as I can see, they are the only authority to whom the applicants can look for payment, because, as far as I can see, the applicants can have no claim against the compensation authority for Merthyr Tydfil. The compensation authority for the county will have a claim for adjustment against the compensation authority for the borough. I may here repeat what I have already stated, that if the compensation authority had not sufficient funds in their hands to pay all they probably had a discretion as to the order in which they would pay. If the facts are as I gather them from the correspondence and the affidavits, it appears that at the date when the rules were moved the compensation authority of the county had sufficient money to pay the compensation money in respect of all the licences the renewals of which were refused in 1907, including the licences in the Merthyr Tydfil area, and that they only refused to pay compensation for the Merthyr Tydfil licences on account of this dispute with regard to the 3000*l.* To my mind that is not a sufficient reason for us to say that the mandamus should not issue. These four rules therefore must be made absolute to fix a day and pay the compensation within six weeks from this date in accordance with r. 34 of the Licensing Rules, 1904.

PHILLIMORE J. I am of the same opinion. In order to support the rule for a mandamus against the Commissioners of Inland

Revenue it must be shewn that the Commissioners ought under s. 3, sub-s. 2, of the Licensing Act, 1904, and r. 4 of the rules made by the Treasury in March, 1905, to have paid the 3000*l.* to the compensation authority for the county of Glamorgan. By s. 3, sub-s. 1, of the Act certain charges are to be "imposed" upon existing on licences. By sub-s. 2 those charges are to be levied, not by the body which imposed them, but by the Commissioners of Inland Revenue. The charges are to be levied by the Commissioners together with and as part of the Excise licence duties, and the Commissioners are to keep a separate account of the amount produced "in the area of any quarter sessions," and that amount is in each year to be paid over "to that quarter sessions." One has to look at s. 8, sub-s. 1, of the Act to ascertain what is meant by the area of quarter sessions. That sub-section provides that "the area of quarter sessions for a county shall for the purposes of this Act include any borough (not being a county borough) or any part thereof which is locally situated in that county." That means that the area of a county borough is not within the area of quarter sessions for the purposes of the Act. In October and November, 1908, when the Commissioners of Inland Revenue collected and paid over the amount produced by the charges imposed upon the licences in the borough of Merthyr Tydfil, Merthyr Tydfil was a county borough, and therefore was not then within the area of the quarter sessions for the county of Glamorgan. Accordingly it would seem that the amount which was at that date collected by the Commissioners of Inland Revenue in respect of the Merthyr Tydfil licences would not be paid into the account of the quarter sessions for the county, but would be paid into a separate account earmarked with the name of Merthyr Tydfil. The answer which is suggested to that is that the Commissioners when they collect and pay over the amount of the charges are not to look at the areas existing at that time, but to the areas as they existed when the compensation authority imposed the charges. No sound reason has been given for that contention, and great inconvenience might be created if effect were given to it, especially in the case of the redistribution of the boundaries between two counties. Therefore I have come to the conclusion that under s. 3, sub-s. 2,

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the Commissioners of Inland Revenue in making up their accounts are to have regard to the areas which exist at the time when the charges are levied, and at that time there were in this case two separate areas, one being the area of the county and the other the area of the county borough. Having levied the charges, by the combined effect of s. 3, sub-s. 2, and s. 8, sub-s. 2, the persons to whom the Commissioners were to pay the money would be the whole body of justices acting in and for the borough. If there had not been a grant to Merthyr Tydfil of a separate commission of the peace, I am inclined to think that the persons to whom the money would have been payable would have been the justices for the county. It may be somewhat difficult to distinguish between the body of justices for the county and the quarter sessions for the county, but notionally they are different entities, and in such a case one sum would be earmarked as payable to the quarter sessions and the other as payable to the justices for the county. But any difficulty which might have arisen in such a case is disposed of by the grant in July, 1908, to Merthyr Tydfil of a separate commission of the peace, and it seems to me that the persons who are entitled to be paid this 3000*l.* are the whole body of justices acting in and for the borough, and the quarter sessions of the county of Glamorgan have failed to make out their right to receive it. That is sufficient to dispose of this rule. It is not for us to determine upon what trusts, if any, or for what purposes the body which receives the money will hold it. I may perhaps point this out, that the grant of a separate commission of the peace to Merthyr Tydfil did not alter the purposes or trusts. The justices of the county borough of Merthyr Tydfil will hold the money for the same purposes as the body of justices acting in and for the borough (who I assume would have been the justices for the county of Glamorgan) would have done if there had been no separate commission of the peace, but that does not decide that it becomes part of the compensation fund belonging to the compensation authority for the county. All this will have to be considered and determined when the equitable adjustment of the compensation levy contemplated by art. 5 of the provisional order is made. Therefore it seems

to me that there is no hardship in our decision, because we only decide that the justices for the county borough are the persons into whose hands the money is to be paid, leaving the rights of all parties to be determined, if there is any dispute, when an equitable adjustment is made.

For these reasons I agree that the rule against the Commissioners of Inland Revenue should be discharged. With regard to the other rules I have nothing to add to what my Lord has said.

BUCKNILL J. During the argument I have had considerable doubt with regard to the first rule. It seemed to me that there was a great deal in the argument of counsel for the applicants as to the true meaning of s. 3, sub-ss. 1 and 2, of the Licensing Act, 1904, more especially when one looks at the words towards the end of sub-s. 2, "and that amount shall in each year be paid over to *that* quarter sessions." But having listened carefully to the judgments of my Lord and my brother Phillimore, I am not prepared to differ from them. Indeed I may say that I have been convinced that their construction of s. 8 is the correct one. It would have been more satisfactory if the Act had been more clearly expressed with reference to the question before us, but however that may be no real harm can arise from our decision, as the final adjustment will set matters right. Therefore I agree that the first rule should be discharged.

With regard to the other rules, for the reasons given by my Lord I think that they should be made absolute.

Rule discharged in the first case; rules absolute in the other cases.

Solicitors shewing cause in first case: *Solicitor of Inland Revenue; Bell, Brodrick & Gray, for Lewis & Jones, Merthyr Tydfil.*

Solicitors in support of rule in first case: *Broad & Co.*

Solicitors shewing cause in second case: *Broad & Co.*

Solicitors in support of rule in second case: *Beamish, Hanson, Airy & Feiling, for Gwilym James, Charles & Davies, Merthyr Tydfil.*

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March 17, 18.

[IN THE COURT OF APPEAL.]

SADLER *v.* WHITEMAN AND ANOTHER.

Money-lender—Registration—"Usual trade name"—Carrying on more than one Business—Money-lenders Act, 1900 (63 *&* 64 *Vict. c.* 51), *s.* 2.

By s. 2, sub-s. 1 (*a*), of the Money-lenders Act, 1900, a money-lender as defined by the Act must register himself as a money-lender under his own or usual trade name, and in no other name, and by s. 2, sub-s. 1 (*b*), he must carry on the money-lending business in his registered name, and in no other name and under no other description, and at his registered address or addresses, and at no other address:—

Held by Fletcher Moulton L.J. and Farwell L.J. (Vaughan Williams L.J. dissenting), that the expression "usual trade name" means the name under which the money-lender has carried on business before registration, and not the name under which he proposes or intends to carry on business from that date.

Held, further, by the whole Court, that s. 2, sub-s. 1 (*b*), operates to prevent a registered money-lender from carrying on business at one address under his own or his usual trade name and also carrying on business at a different address as a partner in a firm registered as money-lenders under a different name.

APPEAL of the plaintiff from the judgment of Bray J. at the trial without a jury.

The defendants, Arthur George Whiteman and Walter Elphick Whiteman, carried on business in partnership as registered money-lenders at Moorgate Street under the name of Cobb & Co. The defendant Arthur George Whiteman also carried on business as a registered money-lender at Seven Sisters Road under the name of Cox & Co., which name was subsequently changed, for reasons not material to this report, to Hill & Co. The original registration of each name was long subsequent to the coming into operation of the Money-lenders Act, 1900. In November, 1908, the plaintiff being in want of money, his son called at the registered address of Cobb & Co. to endeavour to arrange the terms of a loan, and after several conversations with the defendants or their representative a form was handed to him to be filled up by the plaintiff, who filled it up, and on November 28 called, with his son, at the defendants' office. At that interview the amount of the loan was agreed at 250*l.*, but other details were

left open. The same afternoon the defendants' manager went to the plaintiff's house and inspected the furniture over which a bill of sale was to be given as security for the loan; the rate of interest and the time for repayment were also fixed, and before the defendants' manager left the plaintiff's house the bill of sale was executed and the 250*l.*, less a small sum for expenses, was handed by the defendants' manager to the plaintiff. The first two instalments falling due under the bill of sale were paid by the plaintiff; the third instalment, falling due on February 28, 1909, was not paid, but on March 1 the plaintiff tendered a sum of money which he contended was sufficient to pay off the whole balance of principal and interest remaining due under the bill of sale. This was refused, and on March 13 the goods comprised in the bill of sale were seized by the defendants. On March 19, 1909, the writ in the present action was issued, claiming damages for trespass and for wrongful seizure of goods under the bill of sale. An order was obtained at chambers for an injunction for a short time against a sale of the goods seized, which was subsequently continued to the trial of the action, and on April 7 an order was made that the plaintiff be at liberty to pay within a week under protest and without prejudice the amount claimed by the defendants under the bill of sale, and that the action should proceed for damages only. Under the last-named order the plaintiff paid 185*l.* 13*s.* On May 3 the plaintiff delivered his statement of claim asking for damages for trespass, to which the defendants in their defence set up that the goods were lawfully seized under the bill of sale. In August the plaintiff delivered his reply, in which he alleged that the defendants were money-lenders and that the bill of sale had been given to them elsewhere than at their registered address. On January 12, 1910, an order was made by Channell J. that the statement of claim should be amended by adding an allegation that the bill of sale was void under the Money-lenders Act, 1900, and a claim for the return of the money paid by the plaintiff under the order of April 7, 1909. At the trial before Bray J. the main contentions were that the defendants were carrying on business elsewhere than at their registered address, that Cobb & Co. was not their "usual trade name" within the meaning of s. 2, sub-s. 1 (*a*), of

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the Money-lenders Act, 1900, and that they were carrying on two businesses. Bray J. gave judgment on all points in favour of the defendants, and the plaintiff appealed. (1)

Spencer Bower, K.C., and *McCurdy*, for the plaintiff. First, the defendants have not complied with the requirement of s. 2, sub-s. 1 (*a*), of the Money-lenders Act, 1900, that a money-lender must register himself as a money-lender "under his own or usual trade name, and in no other name." It is admitted that they were not registered under their own names, and the expression "usual trade name" can only mean a trade name which is in use by the money-lender at the coming into operation of the Act. A trade name which the money-lender adopts for the purpose of registration, and intends to use in the future after registration, but has not previously used, does not come within those words. The intention of the sub-section is plainly expressed; it is to allow persons who, prior to the passing of the Act, have carried on the business of a money-lender under a trade name, so as to acquire an interest in that name, to register themselves under that name, but in all other cases to require money-lenders to register in their own names. It is clear that "Cobb & Co." was not the real name or the usual trade name of the defendants when they so registered themselves. Secondly, the defendant A. G. Whiteman carried on business under two different registered names and at two different addresses, contrary to the provisions of s. 2, sub-s. 1 (*b*), of the Act. It is no answer to

(1) By 63 & 64 Vict. c. 51 (the Money-lenders Act, 1900), s. 2, sub-s. 1, "A money-lender as defined by this Act—(*a*) shall register himself as a money-lender in accordance with regulations under this Act, at an office provided for the purpose by the Commissioners of Inland Revenue, under his own or usual trade name, and in no other name, and with the address, or all the addresses if more than one, at which he carries on his business of money-lender; and (*b*) shall carry on the money-lending business in his registered name, and in no other name and under no other description, and at his registered address or addresses, and at no other address; and (*c*) shall not enter into any agreement in the course of his business as a money-lender with respect to the advance and repayment of money, or take any security for money in the course of his business as a money-lender, otherwise than in his registered name; . . . ."

say that in one case he was merely a member of a partnership which carried on the business of money-lenders. A partnership in English law has no corporate personal existence distinct from that of its individual members, and a money-lender would none the less carry on the business of money-lending in more than one name and otherwise than at his registered address by reason of the business carried on in the other name and at the other address being a business carried on in co-partnership with another person. A person who covenanted not to carry on a particular business within a certain area would commit a breach of his covenant if he carried on the business within that area in partnership. Applying this to the case of a money-lender, it is clear that he contravenes the Act by carrying on business as a money-lender under his own name at one registered address and also carrying on business as a money-lender in partnership with another person at another registered address. If it were not so, the provisions of the Act would be of no effect. The mischief intended to be guarded against by the Act was the practice adopted by money-lenders of carrying on business in a number of different places and masking their identity under numerous aliases, as in *Gordon* v. *Street*. (1) The intention of the Act would be wholly frustrated if a money-lender could associate himself with a number of nominal partners and register himself under an adopted firm name with one of those persons at one address, and with others under other adopted firm names at other addresses, with all the different permutations and combinations that the number of persons so associated rendered possible. It is clear from the authorities that a breach of any of the provisions of s. 2 of the Act has the effect of invalidating the whole transaction of loan, as well as subjecting the money-lender to the penalties imposed by the section: *Victorian Daylesford Syndicate* v. *Dott* (2); *Bonnard* v. *Dott* (3); *Gadd* v. *Provincial Union Bank*. (4) Thirdly, this case is concluded by *Gadd* v. *Provincial Union Bank*. (5)

(1) [1899] 2 Q. B. 641. at p. 648.
(2) [1905] 2 Ch. 624.
(3) [1906] 1 Ch. 740.
(4) [1909] 2 K. B. 353.
(5) This appeal was twice argued. Upon the first hearing this point was developed in argument, but the Court, though not giving judgment,

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Montague Shearman, K.C., and *Schwabe*, for the defendants. First, if a reasonable construction with reference to the subject-matter is given to the Act, the expression "usual trade name" may be construed as including a trade name intended to be used, and to be the usual trade name, in future; it is a name which is customary and in use. Any other construction would lead to unreasonable consequences. For example, suppose that a firm of money-lenders, who had been carrying on business under a firm name when the Act came into operation, and who were registered under that name, were to take in a new partner, or one of the old partners were to die: according to the contention on behalf of the plaintiff, the partners could not continue to carry on the business under that name because it would not have been the usual trade name of the partnership (as subsequently constituted) at the date of the coming into operation of the Act. If that contention were successful, the result would be that no money-lender or firm of money-lenders could carry on business under a trade name other than his or their own name or names, unless he or they were doing so at the time when the Act came into operation. If that had been the intention of the Legislature, it would have been expressed in the Act in plain terms. But there would be no object in making such a provision. The object of the Act was merely that persons who might deal with a money-lender should know under what name his business was intended to be carried on in the future. This is a penal statute, and, if it is capable of two constructions, the more lenient construction ought, on principle, to be adopted. The decision of Bray J. upon this point of the meaning of "usual trade name" has the support of Bucknill J.'s decision in *Stirling* v. *Silburn & Pyman* (1) and should be affirmed. Secondly, the defendants did not carry on business in more than one name or at more than one address. There is no suggestion that the partnership business of Cobb & Co. was in any sense a sham, and there is no

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expressed a unanimous opinion that the facts of the two cases were wholly different. Upon the second hearing the point was not argued, and it is unnecessary to deal further with it in this report. A further point as to the effect of certain special orders in the action made in chambers does not call for a report.

(1) Ante, p. 67.

infringement of the Act by reason of the fact that the defendant who was a member of the partnership also carried on business as Hill & Co. It is inaccurate to say that this is a case where one man carried on the business of a money-lender in two places, for the partnership business was carried on by both the partners. Further, s. 2, sub-s. 1 (*a*), only requires a money-lender to register himself in accordance with the regulations of the Commissioners of Inland Revenue, and those regulations made in 1900 have substantially been complied with by the defendants. (1) In any event the plaintiff is not entitled to the return of the money, but only to damages for trespass, which were agreed at forty shillings.

Bower, K.C., in reply.

VAUGHAN WILLIAMS L.J. The judgment of Bray J. begins thus: "In this case, which was tried before me yesterday without a jury, there were three points which I did not deal with at the time. They arose upon the Money-lenders Act, 1900, and the points were these. It was said that this bill of sale was invalid, on three grounds: first, on the ground that the defendants, in whose favour the bill of sale was, were carrying on business elsewhere than at the registered address; second, that 'Cobb & Co.' was not their usual trade name; and, third, that they were carrying on two businesses." I will deal first with the "usual name" point, with regard to which Bray J. says: "Now the name 'Cobb & Co.'"—that was one of the names of the firm in

(1) Regulations made under the powers given by s. 3 of the Act by the Inland Revenue Commissioners with the approval of the Treasury:

"The whole of the month of November, 1900, shall be allowed for the first registration.

"At the expiration of three years from the date of the preceding registration, for which period registration is, under s. 3 (2.) of the Act, effective, one calendar month shall be allowed for a renewal of the registration.

"Individuals, firms societies or companies proposing to start in the business of money-lending for the first time after the commencement of the Act must register before doing so."

"A change of any kind in a firm or unincorporated society or company, or in its place or places of business, as also a change in the place or places of business of any incorporated society, company, or individual, shall entail a fresh registration, which must be made within one calendar month of such change.

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which the defendant was a partner—"had never been used before, and the point taken is that it was not their usual trade name, because it had never been used by them at all before when they registered. Now it is true that it had never been used before then, and therefore the question arises whether under those circumstances they can register a name under which they or one of them had not been carrying on business before the date of registration. Upon that point the decision of Bucknill J. in the case of *Stirling* v. *Silburn & Pyman* (1) is a decision in favour of the defendants here. As I pointed out on a previous occasion, I do not think I am bound by a decision at nisi prius of another judge, and therefore I must consider whether that is right; I must pay the proper attention to it, and I must consider whether it is right. If it is not right it means this, as far as I can see: that there never can be a new name adopted by a money-lender unless it be that he is carrying on business, for example, as a grocer as Cobb & Co., and then becomes a money-lender, which of course is hardly a probable event; because nobody can adopt a new name, it is said, unless it has been previously their usual trade name. I do not think it was the intention of the Act to forbid that. I think these words, 'usual trade name,' are somewhat ambiguous, and I am perfectly entitled to construe these words as meaning the trade name under which they intend as a rule to carry on business—the name which is to be their usual name. I think that is within the words of the Act, and, if I were to construe it in any other way, I do not think I should be really carrying out the intention of the Act. Therefore I agree with Bucknill J." I need not read at length the judgment of Bucknill J. in *Stirling* v. *Silburn & Pyman*. (2) He says: "It has been contended on behalf of the defendants that C. Stone could not after the Money-lenders Act, 1900, came into operation legally use the name of 'C. Stirling' as his registered name, because he did not register it at that time, and that therefore the subsequent registration of that name was bad, because it had not been, before he registered it, his usual trade name. I cannot accede to that argument. I think that the form of return to be made by money-lenders issued by the Commissioners of Inland

(1) Ante, p. 67.

(2) Ibid. at p. 71.

Revenue under s. 3 of the Money-lenders Act, 1900, shews that the Commissioners did not place that construction upon the statute. In that form there is a space for the money-lender's own or usual trade name in which the money-lender is to be registered, and there is a separate column for insertion of the 'actual name, &c., of the person in question.' When C. Stone registered himself as 'C. Stirling' on February 9, 1909, he filled up the form with the name 'C. Stirling' as his usual trade name. It was an assumed name. It was not his usual trade name in the sense that he carried on business before in the name of 'C. Stirling,' but it was the name that he was then adopting and wished to be his usual trade name." Then further on he says: "I am of opinion that the provision in s. 2, sub-s. 1 (*a*), of the Money-lenders Act, 1900, that a money-lender shall register himself as a money-lender 'under his own or usual trade name, and in no other name,' does not mean that at the time he registers himself he must, in order to lawfully register a trade name, have a trade name which has previously been and then is his usual trade name. I think a money-lender can lawfully register a name by which he elects at the time of its registration to be known, whether he adopted it before or after the Act of 1900 came into operation." Speaking for myself, I say at once that the word "usual" is generally used in the sense that it describes something that in the past a man generally has done, but has not always done. I do not understand that those who differ from Bray J. and Bucknill J. wish to put that interpretation on the word "usual." I understand them to say that it means the name which up to the time of registration in the past the money-lender has in fact used as his trade name—not a name he has occasionally used, but a name that he has in fact used. I agree that, generally speaking, whether it means always or whether it means more often than not, the word "usual" is usually employed in respect of past transactions. I know, therefore, that if I put some other meaning on the word in this section, I have to justify putting that meaning on the word "usual" by two propositions. First, I think I have to shew that the word "usual" is capable of being used in relation to the future in respect of intention. I will give an illustration of

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what I mean. I think that a man not having carried on the business of a money-lender before, but having carried on some other business, might properly say, "So many people who come to me in my business are travellers returning home who ask me to let them have a little money temporarily that I think I shall take to money-lending as a usual business." I think that this man uses the word "usual" not with reference to the past, but to a usual business that he intends to carry on. Then he might say, "I shall not carry on the money-lending business in the place where I carry on my present business; I shall make the house next door or perhaps a house in another street my office for this new business, and I shall not call myself by the same name, so that my two businesses may not be confounded together." I only give this illustration for the purpose of shewing why I agree with Bray J. that it is possible to put this construction upon the English word "usual." Of course that does not dispose of the matter, because one is not entitled to put this meaning, which is not the primary meaning of "usual," upon this Act of Parliament, unless it can be shewn, as I think it can in this case, that the provisions of the Act of Parliament necessitate the placing of this meaning upon it.

There are cogent reasons on both sides. The fact is that in drawing this Act of Parliament the Legislature had to deal with some matters which had come to be of great importance to the public. Every one was hearing of cases in which the action of money-lenders led to the most unhappy results. Very often those results were aggravated by deliberate action on the part of the money-lender to conceal his identity, and to deal again and again in a different name with the same unfortunate man whose misfortunes disqualified him from dealing on a level commercially with any man from whom he was asking for a loan to enable him to stave off pressing creditors. What I feel is that one thing at all events that a judge ought not to do when he is construing this Act of Parliament is this: he ought not to say that money-lenders by their actions have come to be a terrible mischief to the community, and that here is a good wholesome Act of Parliament which is

intended to check their iniquities, and thus to confer a benefit upon a great many thoughtless persons who are not in a position to take care of themselves; and that, therefore, whenever there is a doubt as to what construction ought to be placed upon this statute, it should be the construction which would make the rod the heaviest for the money-lender. I do not think that is the spirit in which any judge has ever consciously approached this Act of Parliament, but unconsciously one may have a feeling that it is his judicial duty to make this legislative remedy effective, and that is a dangerous state of mind. I think we must construe this Act of Parliament just as we should construe any other. The point we have to consider is this: Here is the word "usual," which can bear many interpretations. When once we get to that point we ought to see which construction is the most consistent with the other provisions of the Act. I will not try to deal with the inferences that have been drawn on the one side or the other. I can only say that, generally speaking, in a case involving the construction of a difficult Act of Parliament, when a judge finds himself one of three with the majority against him, he ought to say that, the question being difficult, he will agree with the conclusions of the majority. I should like to see our judgments in this case registered thus: Held, &c., dubitante (or hesitante) Vaughan Williams L.J.; but I do not like to hide myself behind that, and prefer to state in open Court the reasons which, if I had been sitting alone, would have led me to agree with the decisions of Bray J. and Bucknill J.

I now come to the other two points which have been argued. The first is that the defendants, the holders of the bill of sale, were carrying on business elsewhere than at their registered address. I shall not say much about that, because that turns really upon the particular facts of this case. Every one recognizes that the provision in the Act is such that you may not carry on business elsewhere than at your registered address. The question is what that means. Does it mean that every step in the business is to be done in the office, or does it mean that the office is to be substantially the place where the business is carried on? It is said that that point has been disposed of in

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Gadd v. *Provincial Union Bank* (1) and other cases, but, as that case is now before the House of Lords, I do not think it is necessary to say more than this, that if the previous decisions mean that every part of the transaction is to be transacted at the registered address I do not agree with them. If a man wants to borrow money on the security of a thousand sheep which he has at a farm in the country, he cannot bring them to the office where the security can be looked at; the money-lender must go down if he knows anything about sheep, which is possible, or, if not, he must send some one else down for him to look at the sheep. I do not think it means that everything is to be carried on in the office. Speaking for myself, I think the intention is that the business as a business should be carried on at the registered office, the registered office being the place where the real business of the money-lender is carried on. That is very often a question of degree. The business and each transaction of the business must be done as part of the business. I need not say anything further about that.

The remaining point is that these people were carrying on two separate businesses, and upon this point I feel that the arguments with regard to the mischief that was intended to be guarded against are very strong. I think that if you allow a money-lender to carry on business by himself under a registered name, and also as a member of a partnership, the danger of his doing that in a series of cases is one which, if not guarded against, might lead to those very cruelties which have been perpetrated by some money-lenders by reason of the fact that by some veiling of their identity they are in fact carrying on business with the same unfortunate victim in a series of what are apparently wholly different transactions with different money-lenders. I cannot help thinking that the danger of that happening if you allow the same man to carry on business in two or three firms with different names is very great, and it is not met even by the form provided by the Commissioners of Inland Revenue, which is entitled "Form No. 2. Return pursuant to Money-lenders Act, 1900 (63 & 64 Vic., cap. 51, sec. 2)." That form contains a space for the names of the partners, their residence

(1) [1909] 2 K. B. 353.

and occupation or description. It is said that there is no danger of concealment of identity because, whenever that doubt crosses his mind, a borrower could go off to Somerset House and look up the register and see if the money-lender who was already pressing him was a partner in the fresh firm that he proposed to go to. I think that is a very useless remedy, and that therefore the very mischief could arise. On the other hand I am bound to say for myself that the Act of Parliament obviously treats individuals and firms as being different, but in the case of the business carried on by an individual who happens to be a partner in a business carried on by a firm the question arises, "Is he guilty of the offence of carrying on business otherwise than in his own registered name, or in more than one name, contrary to the provisions of s. 2, sub-s. 1 (*b*), and does he render himself liable to the penalty imposed by sub-s. 2?" I think that the Act of Parliament meant that there should be two sorts of registration—first, registration of an individual, who would thereupon become entitled to carry on the business that he was engaged in as a man, and, secondly, the registration of a firm which would not be regarded in any sense as the business carried on by the individual, but as the business carried on by the firm. Under those circumstances I again here think that the question is a very difficult one of construction, but, unlike the view which I took with regard to the word "usual," I think that the mischief which might arise from the construction which is sought to be put on the Act of Parliament is so great that I hesitate to hold, and must refuse to hold, that business might be carried on by one man at different places and under different registered names, he being a money-lender at one place in respect of the business belonging to him there individually, and a money-lender under another registered name in respect of a business partnership in some firm. There can be no doubt that in each case he is in fact a money-lender. Here again I arrive at the conclusion with great hesitation, but I do not think I should be performing my duty if I did not express both the view that I take as to "usual trade name" and the view that I take in respect of the carrying on of a money-lender's business in two capacities.

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On the question of the efficacy of registration under regulations and forms which have been published under the Act of Parliament by the Inland Revenue Commissioners, if it is to be held that a money-lender may in all respects follow the regulations and the forms, and yet be guilty of a criminal offence and liable to imprisonment or a fine of 100*l.*, I trust that the Legislature will take such steps as shall give the effect of an Act of Parliament to regulations and forms when they have been placed on the table of the House, so that they should not be treated as common forms, but should have the full effect of an Act of Parliament. It is impossible to suppose that the Legislature, because they thought harmful results followed from the business of money-lending as carried on, wished to put money-lenders in such an iniquitous position that, if they followed the regulations and forms which have been recognized for some ten years as good and proper regulations and forms, they should find themselves criminally liable to fine or imprisonment. I know it is said that these prosecutions can only be instituted by permission of the Attorney-General; but there is no sort of excuse for leaving people a day longer than necessary in a position where they are told to obey the regulations and forms of the Inland Revenue Commissioners as to registration, and then, when they have done so, because they did not know that the previous practice which has been recognized by judges was not in strict accordance with the Act of Parliament, should be even technically liable to fine or imprisonment for having carried on business under a name which they had every reason to suppose was properly adopted. The result is that this appeal will be allowed, in accordance with the views of the majority, and, upon one point, in accordance with my own.

FLETCHER MOULTON L.J. There can be no doubt that the drafting of this Act gives rise to grave difficulties in its interpretation. It was an Act that excited a good deal of public attention, and probably amendments were made during its passage through the House, and this may account for the fact that the drafting has not been on a consistent principle throughout. For the most part the draftsman seems to have

conceived the money-lender as a single individual, and if we consider every money-lender as being an individual, the Act can be made to read so as to have a very reasonable meaning. But it is clear from s. 3 that it was contemplated that firms and societies not incorporated might also be money-lenders and that they have to register under the Act, and the necessity of recognizing this will give great difficulty to any Court which has to interpret the meaning of the Act with regard to such firms and societies, since the language of the other sections is apt only when applied to individuals. For these reasons I propose first to consider the meaning of the critical sections of the Act as applied to individuals, and subsequently to consider how this meaning must be modified to meet the case of partnerships. Sect. 2 says that a money-lender "as defined by this Act" shall do certain things. I turn to the definition clause, and I find that "the expression 'money-lender' in this Act shall include every person whose business is that of money-lending." I cannot put any interpretation on those words other than their natural meaning, and therefore every one who, whether he carries on business by himself or whether he carries on business in partnership, carries on business as a money-lender is a money-lender as defined by that Act. No one would hesitate to say that a man who carries on the business of a tailor or a grocer in partnership with some one else is a person whose business is that of a tailor or a grocer, and therefore I cannot think that the Act intends that any person who as a partner in a firm is carrying on a money-lending business should consider himself exempted as an individual from the provisions of the Act relating to individuals merely because he carries on a business in partnership. If this be so, the interpretation of s. 2 with regard to individuals will have a universal effect, incorporate bodies of course being regarded as individuals. Sub-s. (*a*) says that he "shall register himself as a money-lender in accordance with regulations under this Act, at an office provided for the purpose by the Commissioners of Inland Revenue, under his own or usual trade name, and in no other name." To my mind those words do not present any difficulty, but I am bound to admit that there is a very considerable body of judicial opinion against

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my view. However, as this is the first time that it has come before a Court of Appeal, I am bound to give my independent opinion on the point. A man's "own" name practically gives rise to no difficulty. But there is an alternative that he may use his "usual trade name." It is contended on behalf of the defendants that that means any name in which he elects for the future to carry on business, and that it does not mean a name with which he is connected at the moment of registration; that it leaves him free to choose what that name shall be; though, of course, when registered, that name becomes binding upon him. I think that the adjective "usual" precludes this from being the proper interpretation. But what seems to me to be more obviously fatal to it is the prohibition of his registering in any other name. He is to register under his own name or his usual trade name and in no other name. If we are to construe the words "usual trade name" to mean any name that he chooses, how absurd it is to go on to say that he is not to register in any other name than the one he chooses. To my mind it is impossible to think that the Legislature would have used such language if it did not mean to exercise a direct and effective control on the name which any individual might choose for the purpose of a money-lending business. I think that this provision is deliberately intended to prevent the use of aliases, and not only aliases in the sense of many names at the same time, but many names in the course of a man's life. In other words, the Legislature meant to stop a man from trading under one name till such time as that name become too malodorous to use and then choosing another. It intended to limit the choice of name. It allowed a man to use his own name; that he could have throughout his life. He might also have a usual trade name if, though an individual, he could shew there was a name by which in trade he was usually known, which in a sense was his own true name in trade. Then there comes the negative enactment—he shall not use any other name. In other words, he has no free choice of names; he must justify at the moment of registration the name that he has taken, either by its being his own or his usual trade name.

I have listened to very long and able arguments on behalf of

the defendants on this part of the case, but I see no real difficulty in it. It is perfectly true that in England it is customary for the individual to have great liberty in the way of changing his name; it is not a liberty which people in other countries generally have, but here we are accustomed to it. But when we find an enactment of this kind deliberately limiting the choice of names, and saying that a man may not register in any other name than those which have been previously referred to, we can no longer think that the Legislature intended to allow a person for the purpose of the money-lending business to have the same liberty of taking any name that he liked that he would have for the purposes of private life. I think, therefore, that this question as to whether or not a man can register himself as a money-lender under a fictitious name, with which he has had up to that time no connection, must be answered in the negative; he cannot do it. I have not dwelt on the word "usual," but, as a good deal of the argument has turned on it, I wish to say a few words about its interpretation. It must be construed with regard to the then existing circumstances and not to circumstances that are future. It seems to me impossible that "usual" can refer to what only becomes usual in the future, i.e., at a time when ex hypothesi there can only be one trade name. When he has chosen the name he is to have no other for the purposes of his trade, and when you speak of his usual trade name it cannot refer to that which is usual at a time when he can have but one. So to interpret it would be to give no meaning whatever to the word "usual," and I think it is just the same, as I said during the argument, as if one were to say that a man was walking with his "usual" wife. There can be but one wife, and therefore the use of the word "usual" would be grotesque. So I think it would be grotesque here if "usual" referred to a date subsequent to the registration. It is something which you must possess at the moment of registration. In other words, you can only avail yourself of this alternative if by reason of your having for a sufficiently long period carried on other businesses, such as financial businesses, under another name you have acquired a usual trade name. Otherwise you must register in your own name.

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The next important point is as to how the individual is affected by the provisions of sub-s. 2 of s. 2, which begins "If a money-lender fails to register himself as required by this Act." Stopping there, it seems to me that it applies to everybody who, whether alone or in partnership, carries on the business of a money-lender. Every such person is bound to register himself in the way that I have just described. The sub-section goes on, "or carries on business otherwise than in his registered name." This makes it clear that he cannot carry on business otherwise than in his registered name, though it may be that, carrying on business in his registered name, he may be entitled and even bound to say that he is acting on behalf of a partnership in which he is one of the partners. The sub-section continues, "or carries on business in more than one name." I think that this is a matter of great moment. It expresses the intention of the Legislature that a money-lender should have one business and one business only. If, as in this case, a man carries on business by himself, he must not carry on business as a member of a partnership, because in the one case he would have to carry on business in one name, and in the other he would have to carry it on in another name. The Act says that he may not carry on business in two names, and that is one of the main reforms that the Act intended to bring about. The mischief was that money-lenders carried on business in many names and referred their borrowers from one to the other. I cannot think that money-lenders can get out of this salutary provision simply by taking a partner in one case and no partner or a different partner in another. It would to my mind leave the mischief almost unmitigated and certainly unremoved. It is intended that the money-lender should choose whether he should do business alone or in a partnership, but he cannot do both. It is clear, looking at s. 4, that firms are intended to have the benefit of registration in the name of the firm; but then all the partners must register in their own name in express connection with the firm that acts as money-lenders, and if they do that they cannot carry on business independently under any name whatever. The decision to which I have come is supported by the fact that in dealing with a money-lender who is not an incorporated company the

Act says that he shall be liable on conviction to a fine not exceeding 100*l.*, and in the case of a second or subsequent conviction to imprisonment with or without hard labour for a term of not exceeding three months, or to a fine of 100*l.*, or both. This points to the money-lender as an individual being liable to the punishment, and the fact that you were not in business alone, but were only in business as a partner with others in a money-lending business, would be no defence. This emphasizes the individual responsibility as a money-lender of every person who is a partner in a money-lending business. I notice that under s. 4 you find these words: "If any money-lender or any manager, agent, or clerk of a money-lender, or if any person being a director, manager, or other officer of any corporation carrying on the business of a money-lender." Those words seem to imply that a distinction is made between an individual and a corporation, and although considerable difficulty arises when you come to work out what the scheme of registration must be in the case of firms, I think that the best interpretation of the Act, and the necessary interpretation in considering s. 6, is that every individual must register by his own name or by his usual trade name, and that if he is a partner he must register in his name and add a reference to the partnership. He cannot register by a firm name alone and he cannot register by a fancy name. Those decisions I think deal with all the points in the case.

I do not deal with the special point as to the orders which were made in chambers, because I think it is clear that under the later order made by Channell J. the point in question could be raised. I wish, however, to say that in my opinion no rights of the plaintiff were given up under the order that was made in chambers under which the sum of 185*l.* was paid to the defendants.

FARWELL L.J. I have had the advantage of hearing this appeal twice argued. After the first argument I prepared my judgment, and, as the able arguments which I have heard from Mr. Shearman and Mr. Schwabe have not in any way induced me to alter my opinion, I propose now to read it.

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The object of the Money-lenders Act, 1900, is (said the Lord Chancellor in *Samuel* v. *Newbold* (1)) "to prevent oppression." The evil to be remedied was the misery and ruin caused by rapacity preying on necessity, and the means adopted by the Act are drastic and novel. The 1st section enables the Courts to remodel money-lending contracts in certain events. This is an entirely new departure in legislation, as Lord Macnaghten points out in *Samuel* v. *Newbold* (2): contracts with expectant heirs were set aside in Chancery, but on the usual terms on which rescission is granted: this Act enables the Court to make new contracts and without proof of fraud to open up transactions which had been closed; I say without proof of fraud because the Act was not required in cases of fraud: the Courts had ample jurisdiction when fraud was proved. The Act next proceeds to impose fetters on money-lenders in order to provide safeguards for the needy, and to prevent their falling unawares into the clutches of notorious extortioners and to guard them against being pursued by solicitations and temptations. A specimen of the evils to which I refer will be found in the judgment of A. L. Smith L.J. in *Gordon* v. *Street* (3), where it appears that the late Isaac Gordon exacted interest at a rate as high as 3000 per cent. per annum, and took the most stringent precautions to conceal his identity, having, as he said, a gross of aliases. Many instances of the last evil to which I have referred, namely, the temptation of clerks and people whose situations depend on their employers being kept in ignorance of their borrowing, by money-lenders pursuing them and pressing money on them, have often been proved in the Courts. These considerations are germane to the question of the meaning of the Act: *Heydon's Case* (4); but it is obvious that the paramount intention to prevent oppression, and to forge fetters to be imposed on money-lenders, are so vague and general that the Courts have little, if anything, to guide them beyond the words of the Act read literally: in many cases one can say that the Legislature can never have intended such and such a result to follow, but it is difficult to draw any such conclusions in an Act of this nature.

(1) [1906] A. C. 461, at p. 467.
(2) [1906] A. C. at p. 468.
(3) [1899] 2 Q. B. at p. 648.
(4) (1584) 3 Rep. 7b.

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In the present appeal the first question arises under s. 2, sub-s. 1 (*a*): "A money-lender as defined by this Act shall register himself as a money-lender in accordance with regulations under this Act, at an office provided for the purpose by the Commissioners of Inland Revenue, under his own or usual trade name, and in no other name, and with the address, or all the addresses if more than one, at which he carries on his business of money-lender." The defendants registered themselves as Cobb & Co. on August 10, 1908; they had never traded under this name before, and the question is whether money-lenders can adopt a new trade name since the Act. I am of opinion that they cannot. Sub-s. (*a*) commences with requiring registration "under his own name," and this is in accordance with the object of finding a remedy for concealment of identity; but this might have operated hardly on money-lenders sufficiently respectable to have a trade name which was attractive and not deterrent, and "his trade name" was given as an alternative; and then, as the money-lender might have had several trade names, he was required to choose his usual trade name, that is, the one which he principally used. It is clear that he was to have one name and one name only. "In his own or usual trade name and in no other name" are the words of the Act, and any construction that enables him to evade this cannot be right. Bray J. has construed "usual trade name" as meaning the trade name under which "they intend as a rule to carry on business, the name which is to be their usual trade name." In my opinion this is an impossible construction, because the money-lender is entitled to register and use one name only; he cannot have several trade names, and he cannot therefore have any usual trade name; the name must be invariable, not usual. It cannot be said of a man who has not in the past carried on, and cannot in the future carry on, business as a money-lender in more than one name that he has, or even can have, a usual name as a money-lender; he has, and can have, one only name. It is said that this is inconsistent with the regulations and forms made by the Treasury under s. 3. I do not agree. The original regulations state that "individuals, firms, societies, or companies proposing to start in the business of money-lending for the first

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time after the commencement of the Act must register before they do so." But nothing is said to shew that the firm which is to register can register as the firm name anything but the names of the partners: if A. B. and C. D. desire to start a money-lending business in partnership to-day they must register as "A. B. and C. D.," and not as "X. & Co." Moreover, the first regulations have been quite recently withdrawn and the existing regulations omit the paragraph that I have just read from the regulation, but give it as "information," and as such it neither purports to be nor is a regulation under s. 2, sub-s. 1 (*a*). Then it is said that the forms assist the contrary construction. In my opinion they do not; they are the forms issued on the passing of the Act and apply to then existing firms and have never been altered; but if they did, unless they could be read as applying to a firm of (say) tailors who desired to add money-lending to their existing business and to carry on both under their existing tailors' trade name (as to the legality of which I express no opinion), they would be ultra vires as contravening the provisions of the Act. No one could contend that the Commissioners have power to dispense with or abrogate the provisions of the Act intentionally, and, if so, they cannot dispense with them per incuriam. Nor can the regulations be ultra vires for civil and intra vires for criminal purposes. The hardship of punishing a man who has been misled by the regulations is avoided by the necessity of obtaining the fiat of the Attorney-General before prosecution. If a man be entitled to enter into a dozen different partnerships with as many different persons and register each of his firms under a separate title the mischief aimed at by the Act is left open; for I cannot regard the argument that the register enables the borrower to search and find out who are the partners as a satisfactory answer. To tell the man whose financial straits are such that he seeks aid from a money-lender of the type aimed at by the Act to come up to London from any part of England and to search the registers before borrowing is a counsel of perfection, if not an actual mockery.

The next question is this. Sect. 2, sub-s. 1 (*b*), enacts that the money-lender shall carry on "the," not "his," "money-lending

business" in his registered name, and in no other name, and under no other description, and sub-s. 2 supplements this by imposing penalties on a money-lender "who carries on business" in more than one name. The defendant A. G. Whiteman carries on business in partnership with the defendant W. E. Whiteman as Cobb & Co., and by himself separately as Hill & Co. Bray J., differing from Bucknill J., has held that this is not an infringement of the Act. I am unable to agree with him. I have already dealt with the question of the regulations and forms, but the Act is to my mind plain. The fallacy is to say that a partner in a firm does not, but the firm does, carry on business. In English law a firm as such has no existence; partners carry on business both as principals and as agents for each other within the scope of the partnership business; the firm name is a mere expression, not a legal entity, although for convenience under Order XLVIII.A it may be used for the sake of suing and being sued. The Act does not refer to any particular business, but deals generally with the business of a money-lender. If A. registers as, and becomes, a money-lender within s. 6, he carries on the money-lending business or business as a money-lender; if A. and B. do so in the names either of A. and B. or of C. & Co., each of them carries on the money-lending business or business as a money-lender in partnership with the other. If this were not so, then three firms might carry on the business of money-lending without a single individual carrying on such business at all; for example, A. and B. as one firm, A. and C. as another, and B. and C. as a third would all be partners in the money-lending business, but no single one of them would be carrying on the money-lending business or would carry on business as a money-lender. If this were so, money-lenders would only have to hunt in couples by arranging partnerships, and there would be no one carrying on the money-lending business left in England. This not only renders this provision of the Act nugatory, but violates the ordinary meaning of the English language. It is not correct to say that a firm carries on business; the members of a firm carry on business in partnership under the name or style of the firm. It is said that other judges have taken a different view, and I need not say that I give all due weight to that fact, but I am bound to

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act on my own opinion, and I have really no doubt that these two matters are two of the chief mischiefs intended to be prevented by the Act. I can attach no weight to the other suggestion that the money-lenders have for ten years taken this view of the Act. Contemporanea expositio has no application to a modern Act, and I adopt Lord Watson's statement in *Clyde Navigation Trustees* v. *Laird* (1), as the Court of Appeal did in *Goldsmiths' Company* v. *Wyatt*. (2) What Lord Watson said was this: "When there are ambiguous expressions in an Act passed one or two centuries ago, it may be legitimate to refer to the construction put upon these expressions throughout a long course of years, by the unanimous consent of all parties interested, as evidencing what must presumably have been the intention of the Legislature at that remote period. But I feel bound to construe a recent statute according to its own terms, when these are brought into controversy, and not according to the views which interested parties may have hitherto taken."

The next point raises the question of the registered address at which s. 2, sub-s. 2 (*b*), enacts that the money-lender shall carry on the money-lending business and at no other address. This case is distinguished from *Gadd* v. *Provincial Union Bank* (3), by the finding of Bray J. that the transaction in question was substantially carried out at the money-lender's address. As this is a question of fact, I am not disposed to say that the finding was so clearly wrong that it ought to be disturbed. But I must not be taken to assent to the argument that the money-lender who simply sends out advertisements and circulars and then pursues the persons who respond to their own houses and does business with them there complies with the Act. The Act by the negative words used forbids the money-lender from carrying on business at any place other than his registered address; and this, in my opinion, is in order to compel him to assimilate his practice to that of respectable lenders of money who do not go out in pursuit of borrowers. The universal practice is that the transaction is carried out at the lender's office or bank, although,

(1) (1883) 8 App. Cas. 658, at p. 673.

(2) [1907] 1 K. B. 95, at p. 107.

(3) [1909] 2 K. B. 353.

of course, valuations and the like may necessarily be made where the property to be valued is situated.

The next two points did not arise before Bray J. in consequence of his decision on the first three points. It has been held in this Court in *Victorian Daylesford Syndicate* v. *Dott* (1) and *Bonnard* v. *Dott* (2) that an unregistered money-lender cannot recover on any contract of lending; such lending is expressly forbidden by the Act and is made a criminal offence and is therefore void. It is argued that these cases turned on s. 2, sub-s. 1 (*c*), and that the only transaction avoided is an agreement otherwise than in his registered name. If the name registered is in contravention of the Act (as in this case) a trade name, where such trade name cannot properly be registered, there is no name registered at all within the Act; but even if this were not so the contention in my opinion is not correct. The principle is that a contract which is expressly forbidden and made criminal by Act of Parliament can give no cause of action to a party thereto who seeks to enforce it, and I see no practical difference between carrying on the money-lending business in more than one name in violation of s. 2, sub-s. 1 (*a*), or at an address other than his registered address under s. 2, sub-s. 1 (*b*), and entering into agreements under s. 2, sub-s. 1 (*c*). If and so far as any money-lending is done in breach of those sub-sections, such money-lending is forbidden by the Act and made criminal, and can therefore form no ground for a civil action by the money-lender. In my opinion we are bound by the decisions of this Court to come to this conclusion; it is, moreover, in accordance with the object of the Act as stated by the Lord Chancellor, "to prevent oppression"; for the knowledge that they cannot recover their money is a far more effectual inducement to lenders to comply with the requirements of the Act than the somewhat remote contingency of prosecution and fine. It is true that the repudiation of all liability to repay even the money actually advanced is dishonest and demoralizing to the borrower, but that was doubtless present to the mind of the Legislature in 1900. The Act is in itself a complete departure from the

(1) [1905] 2 Ch. 624; affirmed [1906] 1 Ch. 747, n.
(2) [1906] 1 Ch. 740.

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teaching of Bentham and the policy which led to the repeal of the Usury Laws, but this is not a matter that concerns the Court; we have to administer the law as we find it; and, as Lord Campbell, in delivering the judgment of himself and eight other judges (including Pollock C.B. and Sir James Shaw Willes), says in *Reg.* v. *Skeen* (1), "Where by the use of clear and unequivocal language, capable only of one construction, anything is enacted by the Legislature we must enforce it, although, in our own opinion, it may be absurd or mischievous."

The last point is this. The action as originally framed attacked the bill of sale for non-compliance with the provisions of the Bills of Sale Act and asked for damages for trespass by reason of illegal seizure of goods under the bill of sale. In April, 1909, the plaintiff was anxious to get the brokers out of possession, and an order was accordingly made that he should be at liberty to pay the amount claimed for principal and interest and costs under protest and without prejudice to his contention that the bill of sale was invalid, and that the action should proceed for damages only. In January, 1910, an order was made giving leave to the plaintiff to amend his statement of claim by adding allegations of illegality under the Money-lenders Act and a claim for repayment of the money paid by him under the order of April, 1909, as a condition to assenting to the postponement of the trial on account of the illness of one of the defendants. It is contended that when this order was made the money had been paid without compulsion and cannot be recovered except so far as the right was expressly reserved by the order of April, 1909. I am of opinion that this contention is not correct. The money was paid under the compulsion of the brokers' men in the house, i.e., under duress of goods, and was expressly stated to be paid "under protest." These words in the order of April, 1909, are in my opinion general and are not restricted by the words that follow. If this is not so, it would have been idle to give leave to amend in January, 1910. If the defendants intended to set up their present contention they ought to have opposed the amendment on the ground that it was useless and would only lead to a waste of expense. I think that we ought to

(1) (1859) Bell, C. C. 97, at p. 115; 28 L. J. (M.C.) 91, at p. 94.

assume that Channell J. when making the order of January, 1910, construed the order of April, 1909, in the way in which I have construed it; for although it is true that a judge in giving leave to amend does not thereby express any opinion on the merits of the amendment, he must be taken, if he has the materials before him, as in this case, to have held that the contention proposed to be raised is open to the plaintiff: no judge would allow an amendment to be made in order to raise a contention which the plaintiff had precluded himself from setting up. I am therefore of opinion that this appeal should be allowed on the first two grounds that I have mentioned, and that judgment should be entered for the plaintiff for the amount claimed, with costs here and below.

Appeal allowed.

Solicitors for plaintiff: *Durham, Carter & Durham.*
Solicitors for defendants: *Raphael & Co.*

W. J. B.

[IN THE COURT OF APPEAL.]

JONES *v.* STOTT AND OTHERS.

Practice—Costs—Appeal—Cross-Appeal—Dismissal of Appeal and Cross-Appeal with Costs—Taxation—Apportionment of Costs.

A member of a provident society brought an action against the other members, claiming a declaration that he was entitled to remain a member of the society and to the benefits thereof, and an injunction to restrain the defendants from excluding him therefrom. The defendants by their defence admitted that the plaintiff was entitled to remain a member of the society, and denied that they had done, or threatened to do, anything to entitle the plaintiff to sue for a declaration or injunction as aforesaid. At the trial of the action by a judge without a jury, the judge gave judgment for the defendants, but, thinking that, having regard to the circumstances which gave rise to the action, there had been faults on both sides, he gave the defendants no costs of the action. The defendants appealed against so much of his judgment as refused them their costs, and the plaintiff then gave a cross-notice of intention to contend that the judgment should be entered for the plaintiff with costs. The Court of Appeal on the hearing of the appeals ordered that the defendants' appeal should be dismissed with costs to be

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taxed, and that the plaintiff's cross-appeal should also be dismissed with costs to be taxed, one set of costs to be set off against the other. There were no separate briefs on the cross-appeal. On the taxation the Master taxed the costs on the principle that the plaintiff was entitled to all his costs of the appeal except so far as they were increased by his cross-notice of appeal, and the defendants' costs should be disallowed except so far as they were increased by the plaintiff's cross-notice of appeal. He therefore allowed the plaintiff items charged in respect of his counsel's briefs and the fees paid to them and to their clerks and disallowed items charged in respect of the defendants' counsel's briefs and the fees paid to them and to their clerks. On appeal to the judge at chambers, he directed the Master to review his taxation by apportioning these costs between the appeal and cross-appeal:—

Held by the Court of Appeal that, upon the terms of the order made by them as applicable to the above-mentioned circumstances, the decision of the learned judge was correct.

APPEAL by the plaintiff from an order made by Hamilton J. at chambers directing a review of taxation by the Master, as after mentioned.

The action was brought by the plaintiff against the defendant Stott as representing himself and all other members of a society called the Great Central Railway Mutual Provident Society, and the trustees of the society, for (A) a declaration that the plaintiff was entitled to continue to be a member of the society in accordance with the rules thereof, and to participate in the benefits assured to members of the said society by those rules, and to continue to be a member of the society's accident and old age fund, and to participate (so far as old age was concerned) in the benefits assured by the said fund; (B) an injunction restraining the society, its officers and members, from expelling or attempting to expel, or from excluding or attempting to exclude, the plaintiff from being a member of the said society, and from participating in the benefits assured by the rules of the said society and by the rules governing the said fund, and from refusing to accept contributions to the said society and fund from the plaintiff.

The defendants by their defence denied that the society was seeking, or had ever sought, to exclude the plaintiff from membership thereof, or of the said old age fund, and stated that the society had always been, and still was, ready and willing to

recognize the plaintiff as a member of the said society, and of the said old age fund, subject to payment by him of the amount of his contributions due under the said rules and of the extra sums due thereunder; and that the defendants had never disputed the plaintiff's title to be and continue such member as aforesaid, or done or threatened to do anything to entitle the plaintiff to the declaration and injunction claimed.

The action was tried at York before A. T. Lawrence J. without a jury, and, in the result, it being admitted by the defendants that the plaintiff was a member of the society, and that they had no right to exclude him from membership, the learned judge held that there was no need to make any declaration or grant any injunction. On the question of costs, he held that, having regard to the circumstances which had given rise to the action, both parties were to blame. He therefore gave judgment for the defendants, dismissing the action without costs.

The defendants gave notice of appeal against so much of the learned judge's judgment as directed that they should have no costs. The plaintiff then gave notice by way of cross-appeal that, on the hearing of the defendants' appeal, the plaintiff would contend that the judgment of the learned judge should be reversed or varied in so far as it ordered that judgment should be entered for the defendants without costs, and that, instead thereof, judgment should be entered for the plaintiff in the action for the declaration claimed with costs.

Upon the hearing in the Court of Appeal, that Court gave judgment that the judgment of the learned judge should be affirmed, and that both the appeal and cross-appeal should be dismissed. After the delivery of the judgment, a discussion occurred as to costs. It was at first proposed by the Court to order that there should be no costs of appeals on either side; but, the counsel for the plaintiff suggesting that the proper order would be that each appeal should be dismissed with costs, and that one set of costs should be set off against the other, the Court ultimately made the following order, namely, "that the said judgment be affirmed, and the appeal of the defendants dismissed with costs to be taxed by the taxing Master"; and "that the cross-notice of the plaintiff be also dismissed with costs to be

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taxed by the taxing Master"; and "that the taxing Master do set off the plaintiff's costs of appeal and the defendants' costs of the cross-notice, when so respectively taxed, and certify to which of the parties the balance after such set-off is due, and that such balance be then paid by the party from whom to the party to whom the same shall be certified to be due."

Upon the taxation of costs under the above-mentioned order, the chief items in question were items in respect of counsel's briefs and fees paid to them and their clerks. The Master disallowed items charged in the defendants' bill in respect of their counsel's briefs and the fees paid to them and their clerks, and allowed items charged in the plaintiff's bill in respect of his counsel's briefs and the fees paid to them and their clerks. The Master, in his answers to objections made by the defendants to his taxation, stated as follows: "I have taxed upon the principle that the plaintiff gets all his costs of the appeal, except so far (if at all) as they were increased by his cross-notice of appeal, and conversely I have disallowed the defendants' costs of appeal except so far as they were increased by plaintiff's cross-notice of appeal. There were no separate briefs on the cross-notice of appeal, and the result is, in substance, that, if I am right, the defendants pay all the costs of their unsuccessful appeal, except for a few small items in both bills which relate exclusively to the cross-appeal. These I have taxed off the plaintiff's bill and allowed in the defendants', and set off. The defendants object that the briefs and fees to counsel on both sides and the attendances in Court, that is in effect all the costs, should be apportioned, and I gather that they mean 'equally apportioned.' The practical effect would be 'appeal dismissed, no costs of the appeal,' as the costs on each side so taxed would about balance. I cannot construe the order as intending that, nor would it be in accordance with the practice of the taxing office in taxing under such an order. See as to costs of cross-notice of appeal *Robinson* v. *Drakes* (1); *How* v. *Earl Winterton* (2); *The Lauretta*. (3) Our practice follows the principle upon which those cases were decided. The application of that principle in this case works no injustice. The

(1) (1883) 23 Ch. D. 98.
(2) [1896] 2 Ch. 626, at p. 641; 65 L. J. (Ch.) 832, at p. 836.
(3) (1879) 4 P. D. 25.

defendants in their objections to my taxation say 'It is impossible to say that the brief items on both sides were chargeable solely by reason of the defendants' appeal,' but in their brief to counsel on the appeal they say 'as to the cross-appeal it is improbable that anything would have been heard of this if the present appeal (i.e. their own) had not been lodged.' I think that what they then told their counsel more correctly expressed the situation than what they now tell the taxing Master. I have read the briefs and papers and have eliminated anything that relates exclusively to the cross-appeal from the plaintiff's costs and allowed corresponding items to the defendants. Subject to that I have given the plaintiff his costs of successfully resisting the appeal proceedings, which the defendants, not the plaintiff, instituted, and have not given the defendants, whose appeal occasioned the costs and failed, any costs of their failure. If I acceded to the defendants' contention, I should tax contrary to the merits and the proper construction of the order in view of the practice, and should reduce the order of the Court of Appeal to a direction to put the parties to the expense of a futile taxation, meaning in the end 'no costs on either side.'" The result of the taxation was that the Master taxed the plaintiff's costs of the appeal at 63*l.* 16*s.* 10*d.*, and the defendants' costs of the cross-appeal at 4*l.* 1*s.* 5*d.*, and certified that the balance due from the defendants to the plaintiff was 59*l.* 15*s.* 5*d.*

The defendants applied to Hamilton J. at chambers for a review of taxation, and the learned judge ordered that the Master should "review his taxation by apportioning the costs of counsel's briefs and fees on each side between the appeal and the cross-appeal with reference to the actual course taken and time properly occupied on the hearing of the appeals."

E. T. Atkinson, K.C., and *Norman Craig, K.C.*, for the plaintiff. The Master taxed these costs on the correct principle, namely, that the plaintiff was entitled to the general costs of the appeal, and the defendants were only entitled to such extra costs as had been occasioned by the plaintiff's cross-appeal. That is the principle that was laid down by Fry J. in *Saner* v. *Bilton* (1),

(1) (1879) 11 Ch. D. 416.

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where a claim and a counter-claim were both dismissed with costs, and it was held that the plaintiff must pay to the defendant the general costs of the action, and the defendant must pay to the plaintiff only the amount by which the costs had been increased by reason of the counter-claim. The reason given by Fry J. for coming to that conclusion was that the plaintiff in the action was the person who first commenced the litigation, and that it was impossible to say whether the cause of action set up in the counter-claim would ever have been sued for, if he had not begun that litigation. That case is precisely analogous to the present. Here the defendants appeal in the first instance, and, there being that appeal, it is thought desirable on the plaintiff's part that the whole matter should come before the Court of Appeal; and so the plaintiff gives notice of cross-appeal, no doubt considering that he will thereby incur very little extra responsibility for costs in addition to what must necessarily be involved in the appeal started by the defendants. In *Mason* v. *Brentini* (1) the Court of Appeal approved of the decision of Fry J. in *Saner* v. *Bilton*. (2) In this case there were not separate briefs in the cross-appeal, and the appeal and cross-appeal really depended on the same matters; all the costs which were incurred by the defendants, with the exception of the extra costs allowed them by the Master, would have equally had to be incurred if the plaintiff had given no notice of cross-appeal.

[VAUGHAN WILLIAMS L.J. We proposed in the first instance, after the appeals were decided, that, there being these two appeals, both of which had failed, there should be no costs of either.

FLETCHER MOULTON L.J. I think the Court of Appeal meant these to be treated as two independent appeals, and that the costs of each should be taxed independently as in a case where before the Judicature Acts an action and a cross-action were tried together.]

A counter-claim is just as much an independent proceeding as if it were initiated by a writ, and this is an a fortiori case as compared with that of claim and counter-claim, because a counter-claim may be in respect of a matter wholly independent of the

(1) (1880) 15 Ch. D. 287. (2) 11 Ch. D. 416.

claim. The Master states in his answers to objections that it is the general practice in such cases to tax on the principle which he has applied. Such a direction as has been given in this case by the learned judge as to the mode of taxation would really amount to a direction in such cases to the Master to allow to the defendants as costs of the cross-appeal costs which had not really been incurred in respect of that appeal, but in respect of the original appeal, as otherwise it would be impossible to give effect to his order. It would, no doubt, be possible to apportion the items in question, but it would not be right, nor would it be possible, to apportion them with reference to the considerations mentioned in the learned judge's order. [They also cited *In re Brown* (1); *Atlas Metal Co.* v. *Miller*. (2)]

Lowenthal, for the defendants, was not called upon to argue.

VAUGHAN WILLIAMS L.J. In this case we have simply to construe the terms of the order which was made by this Court upon the hearing of the appeal and the cross-appeal. That order commences thus: "Upon hearing Mr. Scott Fox, K.C., of counsel for the defendants and Mr. Norman Craig, K.C., of counsel for the plaintiff on the notice of motion, dated the 26th day of February, 1909, given on behalf of the defendants on appeal from so much of the judgment of the Honourable Mr. Justice A. T. Lawrence given on the trial of this action before him at York on the 15th day of January, 1909, as directs that the defendants shall have no costs and as deprives them of their costs of the action, that such part of the said judgment as directs as aforesaid might be reversed and set aside, and that judgment in the said action might be entered for the defendants with costs, and upon hearing the same counsel on the cross-notice, dated the 19th day of April, 1909, given on behalf of the plaintiff, of his intention to contend that the said judgment should be reversed or varied in so far as it adjudges that judgment be entered for the defendants without costs, and instead thereof that judgment should be entered for the plaintiff with costs." This cross-notice, it will be observed, went to the whole of the plaintiff's alleged cause of action, and the whole of the

(1) (1883) 23 Ch. D. 377. (2) [1898] 2 K. B. 500.

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learned judge's decision that the defendants should have judgment without costs. Then the order proceeds thus: "It is ordered that the said judgment be affirmed, and the appeal of the defendants dismissed with costs to be taxed by the taxing Master." Therefore the defendants failed to get the judgment of the learned judge modified by striking out so much of it as directed that the defendants should have no costs and giving the defendants costs. Then it is further ordered "that the cross-notice of the plaintiff be also dismissed with costs to be taxed by the taxing Master." It seems to me that, so far, it is a very plain order under which there are to be two taxations in respect of these two separate appeals. Having got so far, the order then provides that "the taxing Master do set off the plaintiff's costs of the appeal and the defendants' costs of the cross-notice, when so respectively taxed, and certify to which of the parties the balance after such set-off is due." That seems to me to be in its terms a very specific order, but I am told that it must be read in the light of a practice in respect of cases where there is a claim and counter-claim, which was established by the judgment of Fry J. in *Saner* v. *Bilton* (1), and the result of which is that the Master must conduct the taxation on the basis of the question being which of the two parties is entitled to the general costs. I do not think, myself, that that practice applies to this case, regard being had to the terms of the order made by the Court of Appeal. I think that the intention clearly expressed by the terms of the order is that there should be really two taxations, and, when those taxations have been separately carried out, the amount of one set of costs should be set off against the amount of the other, and the balance be paid by one party to the other in accordance with the result. It seems to me that the order in this case is not, and ought not to be, affected by this practice applicable to cases of claim and counter-claim. It may be that the order which this Court made was not in accordance with the general practice in force, if there was such a practice, in respect of cross-appeals. I may frankly say that, at the time when I was a party to the making of this order, I was not aware that there was any such practice as would give to an

(1) 11 Ch. D. 416.

order of this kind a different result from that which would come about, if the terms of the order were simply looked at, and the taxation conducted accordingly. It was said by the plaintiff's counsel that, in arriving at such a conclusion as I have indicated, the Court would run a risk of directing the Master to allow costs which had not in fact been incurred, and which would only have been incurred if the circumstances of the proceedings before the hearing of the appeals had been in fact different from what they were. I agree that, if the result would be that which is suggested, the Master might say that the order was one which it was impossible to carry out, because it was made on the basis of there being one set of costs of the defendants' appeal and another set of costs of the plaintiff's appeal, and of steps in those two appeals having been taken, which were not in fact taken; so that, when the Master came to tax, he could not possibly allow an amount for costs which were never in truth incurred. But I think, and it seems to me that the learned judge at chambers thought, that no such difficulty really arises in this case. It is true that there was only one brief on each side in respect of these two appeals. If the costs in respect of these briefs could not be apportioned, then the deadlock which was suggested would arise; but I asked the question, and both sides agreed that there would be no difficulty in apportioning the costs in respect of the one brief partly to the one appeal and partly to the other, and I do not understand from the Master's answers that there is any difficulty in doing that; and, that being so, I see no reason for interfering with the order of the learned judge.

FLETCHER MOULTON L.J. I also am of opinion that the order of the learned judge was right. In this case judgment was given in an action for the defendants, but without costs. Both parties appealed from the decision. The plaintiff appealed from the whole of the decision and claimed that the judgment ought to have been for him. The defendants only appealed against so much of the judgment as disallowed their costs. It happened that the defendants lodged their notice of appeal first. Under such circumstances, by Order LVIII., rr. 6 and 7, it is not necessary

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for the respondent to that appeal to give notice of motion by way of cross-appeal, but, if he intends to contend that the decision of the Court below should be varied, he must give notice of that contention in accordance with the rules. In my opinion that is mere machinery to ensure that, if there are appeals by both parties, the two appeals shall come on together, and I see no other object or meaning in the rules. The consequence is that it by no means follows that the appeal and cross-appeal are dependent one upon the other. That may be so, but they may be quite independent. In this case they seem to me to have been independent appeals; and the rights of the parties, when they came to argue the appeals, were, therefore, just the same as if two independent notices of appeal had been given and the two appeals had been heard at the same time. The plaintiff's appeal was of far wider scope than that of the defendants, and went to the whole decision; and it was quite possible, if the two appeals had had to be contested at length, that the Court might have elected to hear that appeal before the other which went merely to the question whether the defendants ought to have been allowed their costs. There would have been nothing, I think, contrary to the rules if the Court had taken that course. Under those circumstances the Court of Appeal made one order, which was in substance two orders, dismissing each of the appeals respectively with costs. The question before us is whether the mere fact that one of the notices is in form a notice of appeal, and the other a notice by way of cross-appeal, ought to give to the former such a position of priority that the taxation of the two sets of costs must be on wholly different principles. In my judgment, the decision of the Court was not to that effect. The effect of the order of the Court was to dismiss each of these appeals, as if it were an independent appeal, with costs, and the Master must tax the costs of the two appeals on that footing. There does not appear to me to be any difficulty in so doing. The case is similar to that which often occurred before the Judicature Acts, namely, when, an action and cross-action having been brought, they had been tried together. In such a case counsel on each side would probably have had only one brief in both actions, and there

would be the same witnesses in each case. In the result the Master must often have had to apportion the costs between the two independent actions. To my mind, therefore, there is no difficulty in interpreting the order in this case, or in carrying it out when so interpreted. I do not say that in all cases where there are cross-notices of appeal there are independent appeals. I can conceive of a case in which the cross-appeal would be absolutely dependent on the result of the original appeal, e.g., it might claim that, if a part of the decision should be set aside, it ought to be done in a particular way. In such a case the Court would, no doubt, in giving their decision make proper provision with regard to the mode in which the costs were to be taxed. The present is not such a case. We have here, as it seems to me, merely to consider the effect of what were practically two independent orders made on two independent appeals. The learned judge appears to have made in his order suggestions—they are no more—for the guidance of the Master as to how he should carry out what is his duty on such a taxation, namely, the apportionment of the items in question, and I see no reason for thinking that these suggestions are otherwise than good ones.

Appeal dismissed.

Solicitors for plaintiff: *Pattinson & Brewer.*
Solicitor for defendants: *D. H. Davies.*

E. L.

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[IN THE COURT OF APPEAL.]

KENT COAL CONCESSIONS, LIMITED *v.* DUGUID AND OTHERS.

Practice—Discovery of Documents—Further Affidavit of Documents—Relevancy of Document—Discretion—Order XXXI., *r.* 12.

In an action for libel brought by a company in respect of an article published in a newspaper, the effect of which was to state generally that the company had no chance of success, the statement of claim contained an innuendo with regard to the meaning of the alleged libel. The defendants by their defence denied that it bore the meaning attributed to it by the innuendo, or any defamatory meaning; and they further pleaded in another paragraph that, in so far as the alleged libel consisted of statements of fact, it was true in its natural and ordinary signification, and, in so far as it consisted of criticism or expressions of opinion, it was a fair and bona fide comment upon matters of public interest. The defence gave with the last-mentioned paragraph particulars, which referred to a number of matters relevant to a justification of the libel in the meaning attributed to it by the innuendo, which the defendants repudiated by their pleading. In pursuance of an order for discovery of documents, the plaintiffs made an affidavit in which they scheduled as relevant certain reports made by the directors to the shareholders in the plaintiff company, and balance-sheets of the company appended thereto, containing statements which on the face of them must have been derived from books of account belonging to the company, which were not included in the affidavit. On an application that the plaintiffs should be ordered to make a further affidavit of documents:—

Held by Farwell L.J. and Kennedy L.J. (Vaughan Williams L.J. dissenting), that, it being admitted by the plaintiffs' affidavit of documents that the before-mentioned reports and balance-sheets were relevant on the issues raised by the defence, and the balance-sheets not being intelligible without those portions of the plaintiff company's books upon which they were founded, the plaintiffs should, upon the principles laid down in *Jones* v. *Monte Video Gas Co.*, (1880) 5 Q. B. D. 556, be ordered to make a further affidavit of documents.

Vaughan Williams L.J. dissented on the ground that, upon the pleadings in the particular case, no sufficiently definite issue of fact was raised upon which the plaintiff company's books of account were shewn to be relevant, and that the application for a further affidavit of documents was in his opinion not made by the defendants for a legitimate purpose, but was made for the purpose of trying to find out facts, not known to the defendants when they published the libel, which would support their defence of fair comment, without their taking

upon themselves the responsibility of justifying in respect of the meaning attributed to the libel by the innuendo, which they by their pleading had repudiated.

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APPEAL by the plaintiffs from an order of Jelf J. at chambers directing them to make a further affidavit of documents, as after mentioned.

The action was brought by the plaintiffs against the financial editor of the *Daily Mail*, and the Associated Newspapers, Limited, the proprietors of that newspaper, for libel. The alleged libel which was contained in an article published in the before-mentioned newspaper, was as follows: "By good authorities the Kent coal experiment is now regarded as unsuccessfully completed. To whatever decision the largest debenture-holders and shareholders of the Kent Collieries, Limited, may come at the meeting they are to hold, the enterprise must now be regarded as something less than a forlorn hope. It has been given a fair trial by the present company—the first time in its history that Kent coal has been given a fair trial. . . . . Of all the Kent coal companies in existence Kent Collieries, Limited, seemed the only one to have any chance of success, and, now that it has fallen, there seems more reason than ever to stand clear of the others." The plaintiffs by their statement of claim averred that the defendants by the alleged libel meant, and were understood to mean, that all genuine and useful work and all work which was likely to result in any profit and benefit to shareholders in connection with the discovery and development of a coalfield in Kent carried on by the plaintiff company had been completed, and that such work had resulted in total failure; and that all work (if any) of the plaintiff company still being carried on was being so carried on in the face of proved and certain failure, and that the plaintiff company had failed, so far as their operations were concerned, to give the enterprise a fair trial, and that the plaintiff company were not an honest and bona fide company carried on for the object of properly exploring coalfields in Kent; and further that the plaintiff company had not and never had had any chance of success and had not achieved any real progress, and that the plaintiff company's affairs were in an inferior position both financially and in all other respects to those of the said Kent

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Collieries, Limited, which company the defendants alleged to be something less than a forlorn hope.

By the order for directions, it was ordered that the defence should give full particulars of defence, and that, after defence delivered, each party should state on affidavit what documents were or had been in their possession or power relating to the matters in question in the action.

The defendants in their defence denied that the alleged libel was written, printed, or published of the plaintiff company in the way of its business or at all, or with any of the meanings alleged in the statement of claim, or with any defamatory meaning. They further pleaded in paragraph 4 of their defence that, in so far as the alleged libel consisted of statements of fact, it was true in its natural and ordinary signification, and, in so far as it consisted of criticism or expressions of opinion, it was fair and bona fide comment made and published upon matters of public interest. The defendants in their defence gave particulars in support of the last-mentioned paragraph. These particulars, which were very voluminous, referred in somewhat vague terms to a number of matters connected with the promotion and transactions of the plaintiff company and its allied syndicates and subsidiary companies, and the financial operations in relation thereto, being matters such as would be relevant to a justification of the alleged libel in the meaning attributed to it by the innuendo. The plaintiffs in their affidavit of documents scheduled, among other relevant documents stated to be in their possession, reports made by the directors of the plaintiff company to the shareholders, together with balance-sheets of the company for the years 1906 and 1907 appended thereto. These balance-sheets were on the face of them compiled from the plaintiff company's books of account. The defendants took out a summons for a further and better affidavit of documents upon the ground that the plaintiffs had not disclosed the books of account from which those balance-sheets were compiled, and that the plaintiffs were bound to disclose those books, as the balance-sheets were unintelligible without the books. (1)

(1) See as to this, and as to the contents of the balance-sheets, the conclusion of the judgment of Farwell L.J., post, p. 915.

The Master made an order directing the plaintiff company, through its managing director, to make a further affidavit of documents. On appeal Jelf J. affirmed the order of the Master.

Feb. 7, 8. *Montague Lush*, K.C., and *J. Bell Hart*, for the plaintiffs. The general rule is that a litigant must accept the affidavit of his opponent as to what documents in his possession are relevant to the issues raised in the action: *Jones* v. *Monte Video Gas Co.* (1) No doubt, if it appears from the affidavit of discovery itself, or from the documents therein referred to, that other relevant documents not disclosed exist in the possession of the party making discovery, a further affidavit may be ordered. There is nothing, however, here to shew that the books of the plaintiffs are relevant to any definite issue raised by the pleadings in the present case. The defendants have denied the innuendo, and do not justify the libel as interpreted thereby. Consequently the facts involved in the innuendo, in reference to which the books of the company might perhaps have been relevant, are not in issue. The judge has come to the conclusion that the books of the plaintiff company are relevant without any materials which justified his going behind the affidavit of discovery. This is really a fishing application for a roving commission to examine the books of the plaintiff company in the hope of discovering some facts of which the defendants had no knowledge when the libel was published, and which may serve as a basis for the contention that the libel was fair comment.

Simon, K.C., and *Sims Williams*, for the defendants. Where the documents disclosed shew that there are other documents in the possession of the party making discovery, which are probably relevant, as being the sources from which the documents disclosed were compiled, or as being necessary for the proper understanding of those documents, there is sufficient ground for requiring a further affidavit of discovery. If the reports and balance-sheets which are scheduled in the affidavit of documents are relevant to the issues in this case, the books from which the statements in them were taken are equally relevant. The books are necessary for the purpose of understanding the statements in the reports

(1) 5 Q. B. D. 556.

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and balance-sheets. The defendants are entitled to shew what the facts were with regard to the position of the plaintiff company, upon which the alleged libel was a comment, in order to shew that it was a fair comment, and for this purpose they are entitled to the order for further discovery: see *Peter Walker & Co.* v. *Hodgson.* (1) In that case the interrogatories were allowed because the matters to which they related were relevant to the matters referred to in the particulars delivered under the plea of fair comment. The defendants' case is that the physical difficulties involved in the enterprise in which the plaintiffs were engaged were such that it could never succeed. Matters very relevant to this question might appear in the books of the plaintiff company for the years 1906 and 1907, upon which are based the reports and balance-sheets, admitted by the affidavit of documents to be relevant. In the alleged libel the defendants were commenting upon the history of these coal companies in Kent, and the documents in question, as shewing the history of the plaintiff company, are relevant to the question whether the comment was fair. It is not on this application a question of inspection, but merely of a further affidavit of documents. If the application is granted, the question of inspection will arise later on, after a further affidavit of documents has been made; and, upon that affidavit, it will be for the Court in its discretion to say of what documents and to what extent the defendants are entitled to inspection. On such an inspection, the plaintiffs may seal up entries which they swear not to be relevant. [They also cited *Taylor* v. *Batten* (2); *Compagnie Financière du Pacifique* v. *Peruvian Guano Co.* (3); *Yorkshire Provident Life Assurance Co.* v. *Gilbert.* (4)]

J. Bell Hart, for the plaintiffs, in reply. This case was really fought before the learned judge as involving the question of inspection. It would be of no advantage to the defendants to have a list of documents set out in a further affidavit; the substantial question is whether they are entitled to inspection of the plaintiff company's books. If the principle vouched by the defendants, namely that, because a document disclosed as relevant refers to another document not disclosed, therefore there

(1) [1909] 1 K. B. 239.
(2) (1878) 4 Q. B. D. 85.
(3) (1882) 11 Q. B. D. 55.
(4) [1895] 2 Q. B. 148.

must be further discovery, were carried as far as they suggest, it would lead to grave oppression. If a company must under such circumstances as these discover all its books, it would be open to a writer first to comment upon its position conjecturally, and, when sued for libel, give wide particulars under the plea of fair comment, and then fish through all the company's books for materials to support it. Cases like *Jones* v. *Monte Video Gas Co.* (1) no doubt provide a test, but were not intended to lay down a hard and fast line on this subject. It does not follow from those cases that, because a few words in a document mentioned in an affidavit of discovery may refer to another document not scheduled therein, the party making discovery is bound to make discovery of the document so referred to. There really is not anything in issue which makes the plaintiff company's books relevant.

[KENNEDY L.J. The innuendo seems to import that the company's affairs were not honestly managed.]

The defendants have repudiated the innuendo. The suggestion of the defendants now appears to be, not that there was any malversation or misappropriation of funds by those who managed the plaintiff company, but that money was being applied to an undertaking that for physical reasons must be and was shewn to be a failure; that the public were being misled into providing money for a hopeless enterprise. The company's books would not shew anything as to this, one way or the other, nor in reality do the balance-sheets which were discovered. It cannot be that, because by mistake an irrelevant document is referred to in an affidavit of discovery, any other irrelevant document therein referred to must also be discovered. The defendants do not admit that the libel means that the company was a fraudulent concern, or allege that to be so, or that the statements in the plaintiffs' books are false or fraudulent. That being so, the books cannot be relevant. The substantial question here is as to inspection, to which the question of discovery is really only a preliminary. If the plaintiffs are forced to discover these documents, they will have great difficulty in preventing the defendants from having inspection of all their books, for they will be taken to have admitted their

(1) 5 Q. B. D. 556.

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relevance. It is very oppressive that, upon such slender grounds for suggesting that they are relevant to any issue in the case, the defendants should claim discovery of all the plaintiffs' books for the years in question.

Cur. adv. vult.

March 7. VAUGHAN WILLIAMS L.J. read the following judgment:—The matter with which in this case we have to deal is one for the discretion of the judge before whom the case comes at chambers. No one is entitled de jure to an order for discovery, still less to an order for further discovery. The judge at chambers grants or refuses such orders as in his discretion he may think right. In this case Jelf J. exercised his discretion at chambers, and upon an appeal from that exercise of discretion by him the matter has come before this Court. My brothers think that the discretion of the learned judge was rightly exercised, or, at all events, they are not disposed to interfere with his exercise of it. I am sorry to say that I feel compelled to come to a different conclusion. This being a matter of discretion, I think that, generally speaking, in cases of this kind it would be the better course for one not to express one's difference of opinion, but to acquiesce in the view taken by the judge at chambers and one's learned brothers; but it appears to me that in this particular case the exercise of discretion turns to a great extent on a question of principle, and I therefore think it my duty to express the reasons why I differ from the view taken by the majority of the Court.

This is an appeal against an order ordering the plaintiffs to make a further and better affidavit of documents. The action is for libel. [The Lord Justice here read the alleged libel.] The alleged libel, it will be seen, makes no definite statement of fact. It implies that the plaintiff company has not given "Kent coal" a fair trial, because it states that the company known as the Kent Collieries, Limited, gave for the first time Kent coal a fair trial, and alleges that, of all the Kent coal companies in existence, Kent Collieries, Limited (i.e., a colliery not the plaintiff company), seemed the only one to have any chance of success, and, now that it has fallen, there seems more reason than ever to stand clear of

the others. No doubt the alleged libel suggests a condition of things which negatives any chance of success for any other of the Kent coal companies still in existence; but it does not make any statement of the facts which have brought about the condition of forlorn hope which the alleged libel by inference imputes to all these companies except the Kent Collieries, Limited. The innuendo cannot be relied on as specifying the facts, if any, intended to be stated as having brought about the hopeless condition which, in the opinion of the critic, the author of the alleged libel, has reduced the numerous Kent coal companies to a condition of forlorn hope, for the defendants deny the meanings imputed by the innuendo. The defendants, it is true, while averring by their defence that there is no libel or defamatory meaning to be attached to the words published, set up the plea of fair comment, alleging that, in so far as the said words consist of statements of fact, the same are in their natural and ordinary signification true in substance and fact, and that, in so far as they consist of criticism or expressions of opinion, they are fair and bona fide comment made and published in the said newspaper upon matters of public interest. The order for directions ordered "Defence with full particulars": just as, in the case of *The Rory* (1), there being a general allegation that the damage to cargo was occasioned by the ship being in a defective condition by reason of her being unfit to carry the cargo or through the negligence of the defendants or their servants, particulars were ordered to be given as to the precise defects by which the ship was rendered unfit to carry the cargo. Some particulars have been delivered called "Schedule of particulars referred to in paragraph 4 of the defence." I do not think that these particulars attached to the defence of fair comment, set up by paragraph 4, can in any way be regarded as enlarging or defining the statement of facts in the libel.

In this state of the pleadings I propose to ask myself two questions: First, what was the obligation of discovery lying on the plaintiffs upon the making of the direction that, after defence delivered, the plaintiffs and defendants respectively should answer on affidavit stating what documents are or have been in

(1) (1882) 7 P. D. 117.

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their possession or power relating to the matters in question in this action? I have already pointed out that there is a denial of the innuendo and no justification of the facts involved in the innuendo, but merely a justification of the facts alleged by the words of the libel in their natural and ordinary signification, and that the words of the libel are so vague and general as to raise no definite issues of fact. There is nothing to indicate what were the conditions of the plaintiff company which prevented the plaintiff company from giving the Kent coal enterprise the fair trial which the Kent Collieries, Limited, gave, or what it was which gave the Kent Collieries, Limited, the chance of success which the other Kent coal companies never had. There are no particulars of defence which supply the facts intended to be averred by the very general words of the libel. I think that in this state of things the plaintiffs might have and should have asked to have the particulars delivered by the defendants as particulars of defence set aside as wanting in relevancy and precision. The particulars given by the defendants are not particulars of facts stated in the libel—are not particulars, that is, of the facts justified with reference to which fair comment is alleged—but are really particulars appropriate to a justification of the innuendo which the defendant company has denied and repudiated. These particulars as thus utilized are merely a vehicle for the allegation of defamatory facts which the defendants have not justified.

The judgments in the case of *Compagnie Financière du Pacifique* v. *Peruvian Guano Co.* (1) make it clear that a document the discovery of which can be required is a document relating to some matter in issue in the action.

Being of opinion that the plaintiffs, if they had made the objection, after delivery of defence, ought to have been relieved from making an affidavit of discovery till the issues were defined by the defendants by a proper statement of the facts alleged in the libel, which they stated to be true if the libel is read in its natural and ordinary signification, the question now arises, what is the effect of the plaintiffs having included in their affidavit a report of the company and the accompanying balance-sheet?

(1) 11 Q. B. D. 55.

Does this entitle the defendants to a further and better affidavit setting forth the accounts on which the balance-sheet must have been framed?

There is no doubt, to my mind, but what it is not unreasonable to surmise in the present case that the plaintiff company must have in its possession accounts which would vouch the figures in the balance-sheet attached to the report which the plaintiffs themselves have included in their affidavit of documents, and that prima facie the defendants bring themselves within one of the three sources of information which entitle them to ask for a further affidavit of documents, notwithstanding the rule as to the conclusiveness of the affidavit of documents; but it is always discretionary to grant or refuse an affidavit of documents. No affidavit of documents, whether the first affidavit or a further affidavit, should be ordered in a case where the Court comes to the conclusion that the application for the affidavit is not made in good faith or for a proper purpose. In my opinion, the defendants are asking for this further affidavit, not for the purpose of assisting them to prove their own case or rebut the plaintiffs' case, not as relevant to any issue at present defined by the pleadings, but for the purpose of ascertaining facts which are not alleged on their pleadings, and which were not facts which were present to their mind or within their knowledge when they made the comment which they now call a fair comment. In my opinion, we should not make the order for a further affidavit unless and until the defendants have particularized the vague allegations of fact upon which they say that the libel, so far as it expresses opinion and criticism, is based. The defendants, in my opinion, are taking a step which, whether they intend it or not, can be utilized to enable them, without the risk of justifying, to obtain evidence of the facts which would have been in issue if they had admitted the innuendo and justified, and to use such evidence in support of their defence of fair comment. I wish to point out generally that particulars of fair comment cannot be ordered, nor in my opinion given. The particulars ordered in this case were particulars of defence, and as such must be precise. The defendants in giving particulars of defence must not frame them so as to

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constitute, to use the expression of Lord Halsbury in *Markham* v. *Wernher, Beit & Co.* (1), "a lively history in which no element of particularity is to be found." Such particulars ought to be struck out, as was laid down in *Arnold & Butler* v. *Bottomley.* (2) A defendant who pleads a justification must state in his defence or his particulars of justification the specific facts or instances upon which he relies in order to prove his plea, and he can obtain inspection of the plaintiff's books or documents only in respect of such specific facts or instances. This is the principle which was acted on in *Markham* v. *Wernher, Beit & Co.* (1) *The Rory* (3) also shews that a plea justifying the publication of defamatory words must state the charge specifically, for it is only right and fair that each party should know definitely before trial what is the precise charge which will be made against him. Can that possibly be said in the present case? As a matter of discretion I should not allow a defendant who has delivered such improper particulars to obtain an order for further discovery, even though the plaintiff did not apply to have the particulars struck out, and proceeded to make an affidavit of documents including the report. If I had had to make the order I should have thought that, as this appeal was only necessitated by the neglect of the plaintiffs to make the objection, upon which I have decided this case, at the proper time, they must bear the costs of this appeal and below, and that the defendant company should have the opportunity of delivering particulars stating the facts which they say are true in substance and fact within the meaning of the libel according to its natural and ordinary signification.

FARWELL L.J. read the following judgment:—This is an action for libel. The defendants deny that the words used in the article of which complaint is made bear the meaning attributed to them by the innuendo, but plead that they are true in their ordinary signification. Anything relevant to this issue—namely, that the words are true in their ordinary signification—is proper matter for discovery, provided that the charge in the libel is

(1) (1902) 18 Times L. R. 763. (2) [1908] 2 K. B. 151.
(3) 7 P. D. 117.

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by itself, or has been made by particulars, sufficiently definite to comply with the rules of the Court in libel actions. The present article appears to me to allege, amongst other things, that the plaintiff company has no chance of success, and should be avoided. The plaintiffs appear to have so read it, and have filed without objection an affidavit of documents, to which they have scheduled their reports and balance-sheets for 1906 and 1907, and they thereby admit that those documents are relevant. These documents refer to their accounts. The Master and the learned judge have both held that the plaintiffs are bound to make a further affidavit scheduling these books of account, in accordance with the rule established by *Jones* v. *Monte Video Gas Co.* (1), which adopted the old Chancery practice as stated by Cotton L.J. in the following terms (2): "The question before us turns upon Order xxxi., r. 12, which, I think, is founded upon the former practice of the Court of Chancery. When an affidavit of discovery was sought, it could not be contradicted, and must have been taken to be sufficient, unless from the documents referred to, or from an admission in the pleadings of the party from whom discovery was sought, or from the affidavit itself, it could be gathered that some documents were withheld. The object of this practice was to prevent a conflict of affidavits as to whether the affidavit of documents was sufficient." This rule has not been modified but enlarged by Order xxxi., r. 19. The plaintiffs are not, of course, bound to give the defendants permission to range at large through their books, but they are bound to schedule such portions of their books as relate to the matters set out in the balance-sheets and reports already exhibited and admitted to be relevant. A balance-sheet is worthless without the books from which it has been made up. When once a balance-sheet is admitted to be relevant, so much of the books as is the foundation of those balance-sheets is also admitted to be relevant. It is clear in this case that those portions are material; of the items set out as the assets of the company a part only represents tangible assets, the rest being sums expended on expenses, directors' fees, underwriting, and the like, and the tangible assets are lumped together in such a

(1) 5 Q. B. D. 556. (2) 5 Q. B. D. 559.

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form that nine-tenths thereof may be the cost price of expired options. Whether the company has any real chance of success or not depends in a great measure on what available capital it has left, and this will appear from the books. No objection to the particulars is raised on this summons or appeal. I am of opinion, therefore, that the order appealed from is right and that this appeal should be dismissed with costs.

KENNEDY L.J. I have had an opportunity of considering the judgments which have been delivered by my learned brothers, and I only desire to say that I agree with the conclusion arrived at by my brother Farwell and the reasoning upon which it is based.

Appeal dismissed.

Solicitors for plaintiffs: *Charles Trevor & Co.*
Solicitors for defendants: *Lewis & Lewis.*

E. L.

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Held that, though the debt formed part of the judgment debtor's estate, it was by reason of the service of the garnishee order nisi property subject to a charge, and the trustee was, therefore, only entitled to receive payment of the debt after first satisfying the judgment creditor's claim under the garnishee order nisi. GALBRAITH *v.* GRIMSHAW AND BAXTER **C. A. 339**

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Upon the construction of s. 105, sub-s. 1, of the Bankruptcy Act, 1883, and r. 183 (1.) of the Bankruptcy Rules, 1886, the Court has no jurisdiction to order a debtor to pay any part of the petitioning creditor's costs of an unsuccessful bankruptcy petition. *In re* A DEBTOR (NO. 1103 OF 1909) - - - - - **C. A. 313**

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Where a debtor against whom a bankruptcy petition has been presented disputes the debt of the petitioning creditor, and the usual order is made under s. 7, sub-s. 5, of the Bankruptcy Act, 1883, for a stay of proceedings on the petition, upon the debtor giving security, for the trial of the question of the validity of the debt, and upon the trial of that question the debtor admits the debt and pays the amount of the debt and costs into Court, the petitioning creditor is not bound to accept payment of the debt by taking the money out of Court, but may proceed with the bankruptcy petition, and, subject to any other objections which may arise upon the hearing of the petition, a receiving order may be made upon it.

BANKRUPTCY—*continued.*
So *held* by the Court of Appeal, reversing the decision of the Divisional Court.

Where a petitioning creditor gives notice to the debtor that he does not intend to proceed with the petition, and, on the application of the creditor's solicitor, the petition is dismissed, the creditor has not neglected to appear on his petition, within r. 163 of the Bankruptcy Rules, so as to require the leave of the Court for the presentation of a subsequent petition on the same act of bankruptcy.

So *held* by the Divisional Court. *In re* GENTRY - - - - - - **C. A. 825**

3. —— *Debtor and Creditor—Mutual Debts or Dealings—Contract by Debtor to sell Houses —Specific Performance—Set-off of Debt against Purchase-money—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 37, 38.

By two contracts dated respectively June 18 and July 2, 1908, the debtor agreed to sell for 880*l.* four houses which were subject to a mortgage for 600*l.* The debtor was indebted to the purchaser in the sum of 257*l.* for work done by the purchaser to certain houses, including those agreed to be sold. On July 11, 1908, the purchaser heard for the first time that the debtor had committed an act of bankruptcy on the previous June 30. On October 12, 1908, a receiving order was made against the debtor in a county court, and adjudication followed. The purchaser, having accepted the title and entered into possession, applied to the county court judge, against the trustee in bankruptcy, for specific performance of the two contracts and for a declaration that he was entitled to set off the 257*l.* due to him from the debtor against the balance of the purchase-money due from him to the debtor after deducting the amount due on the mortgage. The county court judge held that the purchaser was only entitled to specific performance on payment of the balance of the purchase-money in full to the trustee :—

Held by the Divisional Court and the Court of Appeal (Fletcher Moulton L.J. dissenting), that there had been mutual dealings between the debtor and the purchaser within the meaning of s. 38 of the Bankruptcy Act, 1883, and that the purchaser was therefore entitled to specific performance upon the terms that the 257*l.* due to him from the debtor be set off against the balance of the purchase-money. *In re* TAYLOR. *Ex parte* NORVELL - **C. A. 562**

4. —— *Friendly Society — Defaulting Treasurer—Removal from Office—Bankruptcy of Treasurer — Preferential Debt — Friendly Societies Act*, 1896 (59 & 60 *Vict. c.* 25), *ss.* 34, 35, 106.

At the date when the treasurer of a friendly society ceased to be an officer of the society he was liable to account for moneys of the society which he had received and had improperly retained. Shortly afterwards he was adjudicated a bankrupt.

Held, that the society was entitled, by virtue of s. 35 of the Friendly Societies Act, 1896, to be paid out of his assets the sum due from him in priority to all his other creditors.

In re Miller, [1893] 1 Q. B. 327, followed.

BANKRUPTCY—*continued.*

In re EILBECK. *Ex parte* TRUSTEES OF THE "GOOD INTENT" LODGE, NO. 987 OF THE GRAND UNITED ORDER OF ODD FELLOWS
Phillimore J. 136

5. —— *Sale of Goods—Contract induced by Fraud of Purchaser—Vendor's Right to disaffirm Contract—Disaffirmance after Receiving Order against Purchaser—Title of Trustee in Bankruptcy—Mutual Dealings—Set-off—Damages for Fraud—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 38, 43, 44.

A sale of goods upon credit was induced by the fraud of the purchaser, who upon obtaining them pledged them with a pawnbroker. After the purchaser had paid part of the price a receiving order in bankruptcy was made against him. The vendor then discovered the fraud and disaffirmed the contract, retaking possession of the goods upon payment to the pawnbroker of the sum advanced upon them. The purchaser having been adjudicated bankrupt, his trustee in bankruptcy brought an action against the vendor, claiming (1.) to recover the goods or their value after giving credit for the sum paid to the pawnbroker to redeem them; or (2.) in the alternative to recover the amount paid to the vendor on account of the purchase price:—

Held, (1.) upon the authority of *In re Eastgate, Ex parte Ward*, [1905] 1 K. B. 465, that the trustee acquired the property in the goods subject to the right of the vendor to disaffirm the contract of sale and to retake possession of the goods; that the vendor had a right to disaffirm the contract after the date of the receiving order; and that therefore the trustee was not entitled to recover the goods or their value; and (2.) upon the authority of *Jack* v. *Kipping*, (1882) 9 Q. B. D. 113, that the vendor was entitled, under s. 38 of the Bankruptcy Act, 1883, to set off the damages caused by the fraud of the bankrupt, in this case the sum paid to the pawnbroker to redeem the goods, against the amount paid on account of the purchase price. TILLEY *v.* BOWMAN, LIMITED **Hamilton J. 745**

6. —— *Trustee — Fidelity Bond — Surety — Default of Trustee—Penal Interest—Liability of Surety—Unpaid Remuneration of Trustee—Set-off — Disbursements — Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 74, *sub-s.* 6.

A trustee in bankruptcy and his surety entered into the usual bond with the Board of Trade in the penal sum of 500*l.* (afterwards reduced to 100*l.*) for the due performance of his duties as trustee, subject to a condition avoiding the bond if he should duly perform his duties, or if he made default and the surety should "make good any loss or damage occasioned by any such default." The trustee improperly retained for some years a sum of money, and, on his default being discovered, he was removed from his office and, pursuant to s. 74, sub-s. 6, of the Bankruptcy Act, 1883, he forfeited his remuneration as trustee and was surcharged with penal interest on the sum he had improperly retained, and this penal interest exceeded 100*l.* He made good the sum he had retained, but did not pay the penal interest:—

Held, that the surety, by reason of his liability

BANKRUPTCY—*continued.*

under the bond to make good "loss or damage occasioned" by the default of the trustee, was bound to pay the penal interest to the extent of 100*l.*

Held, also, that the trustee's remuneration that was forfeited could not be set off against the penal interest.

Board of Trade v. *Guarantee Society*, [1910] 1 K. B. 408, n., followed on this point.

But *held*, that the disbursements properly made by the trustee could be set off against such interest. BOARD OF TRADE *v.* EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED
Phillimore J. 401

See next case.

7. —— *Trustee in Bankruptcy — Bond — Surety—Default of Trustee—Liability of Surety —Unpaid Remuneration of Trustee—Set-off—Disbursements.*

In this case the Divisional Court was of opinion that the question must be decided in favour of the Board of Trade. "The single point is whether the defendants, in making good the loss or damage occasioned by the default of the trustee in not sufficiently performing his duties, are entitled to deduct from the amount which he has not paid the amount which has not been paid to him, but which has been earned by him by way of remuneration. . . . . The contract is, that whatever money is not properly accounted for by the trustee is to be made good by the guarantee society, and we are not to look to such things as the question of whether there is or is not any remuneration due, when that remuneration is declared to be forfeited, and therefore is no longer due to the man who has made default." BOARD OF TRADE *v.* GUARANTEE SOCIETY (June 10, 1896) - **Div. Ct. [1910] 1 K. B. 408, n.**

See preceding case.

—— Trustee in bankruptcy, Position of—Leaseholds—Property held by the bankrupt as trustee for any other person - **271**
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Considered by C. A. *In re* ENOCH AND ZARETZKY, BOCK & Co.'S ARBITRATION **[1910] 1 K. B. 327**

—— *Board of Trade* v. *Guarantee Society*, [1910] 1 K. B. 408, n.
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—— *Bristol Gas Company and Bristol Tramways and Carriage Company, In re*, [1909] 2 K. B. 297.
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—— *Ching* v. *Surrey County Council*, [1910] 1 K. B. 736.
Followed by C. A. MORRIS *v.* CARNARVON COUNTY COUNCIL **[1910] 1 K. B. 840**

—— *Collen* v. *Wright* - (1857) 8 E. & B. 647
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—— *Coulson* v. *Disborough* - [1894] 2 Q. B. 316
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—— *Dendy* v. *Evans* - - [1909] 2 K. B. 894
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—— *Freeman* v. *Jeffries*, (1869) L. R. 4 Ex. 189.
Distinguished by Hamilton J. BAKER *v.* COURAGE & Co. - **[1910] 1 K. B. 56**

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—— "*Glendevon*," *The* - - [1893] P. 269
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—— *Gozney* v. *Bristol Trade and Provident Society*, [1909] 1 K. B. 901.
Distinguished by C. A. RUSSELL *v.* AMALGAMATED SOCIETY OF CARPENTERS AND JOINERS **[1910] 1 K. B. 506**

—— *Gundry* v. *Sainsbury* - [1910] 1 K. B. 99
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—— *Holwell Iron Co.* v. *Midland Ry. Co.*, [1909] 1 K. B. 486.
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—— *Jones* v. *Monte Video Gas Co.*, (1880) 5 Q. B. D. 556.
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—— *Keighley, Maxsted & Co. and Bryan Durant & Co., In re*, [1893] 1 Q. B. 405.
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—— *Llangattock* (*Lord*) v. *Watney, Combe, Reid & Co.*, [1909] 2 K. B. 884.
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—— *Lowery* v. *Walker* - [1909] 2 K. B. 433
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—— *Masson, Templier & Co.* v. *De Fries*, C. A. [1909] 2 K. B. 831.
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—— *Miller, In re* - - [1893] 1 Q. B. 327
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—— *Morris* v. *Carnarvon County Council*, [1910] 1 K. B. 159.
Affirmed by C. A. - **[1910] 1 K. B. 840**

—— *Moss* v. *Elphick*, [1910] 1 K. B. 465.
Affirmed by C. A. **[1910] 1 K. B. 846**

—— *Nelson & Sons* v. *Nelson Line, Liverpool*, [1907] 2 K. B. 705.
Distinguished by Bray J. *In re* ROYAL MAIL STEAM PACKET COMPANY AND RIVER PLATE STEAMSHIP COMPANY **[1910] 1 K. B. 600**

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—— *Reg.* v. *Broome*, (1851) 18 L. T. (O.S.) 19. Dictum of Martin B. in, disapproved of by C. C. A. REX *v.* PORTER [1910] 1 K. B. 369

—— *Reg.* v. *Carter*, (1884) 12 Q. B. D. 522. Not followed by C. C. A. REX *v.* ROWLAND - - [1910] 1 K. B. 458

—— *Reg.* v. *Drage*, (1878) 14 Cox, C. C. 85. Not followed by C. C. A. REX *v.* ROWLAND - - [1910] 1 K. B. 458

—— *Reg.* v. *Smith*, (1897) 18 Cox, C. C. 470. Not followed by C. C. A. REX *v.* THOMPSON - - [1910] 1 K. B. 640

—— *Reg.* v. *Staines Local Board*, (1889) 60 L. T. 261. Followed by Div. Ct. THAMES CONSERVATORS *v.* GRAVESEND CORPORATION - - - [1910] 1 K. B. 442

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—— *Swaine* v. *Wilson*, (1889) 24 Q. B. D. 252. Distinguished by C. A. RUSSELL *v.* AMALGAMATED SOCIETY OF CARPENTERS AND JOINERS [1910] 1 K. B. 506

—— *Weiner* v. *Gill*, [1906] 2 K. B. 574. Explained and distinguished by C. A. WEINER *v.* HARRIS [1910] 1 K. B. 285

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COUNTY COURT—*Costs—Power of County Court Judge to award fixed Sum for Costs before Taxation—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 113, 118.

A county court judge has no power under s. 113 of the County Courts Act, 1888, to award a party a fixed sum for costs which have not been taxed under s. 118. GOLDING *v.* SMITH Div. Ct. 462

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CRIMINAL LAW—*Conspiracy — Agreement — Indemnification of Bail—No Wrongful Intent—Act tending to produce a Public Mischief.*

An agreement by an accused person to indemnify his bail is illegal in that it tends to produce a public mischief, and the parties to the agreement are, therefore, guilty of the offence of conspiracy, although they may have entered into the agreement without any wrongful intent.

Dictum of Martin B. in *Reg.* v. *Broome*, (1851) 18 L. T. (O.S.) 19, disapproved of. THE KING *v.* PORTER - - - C. C. A. 369

2. —— *Conviction—Person insane at Time he did Act charged—Special Verdict—Right of Appeal—Trial of Lunatics Act*, 1883 (46 & 47 *Vict. c.* 38), *s.* 2, *sub-ss.* 1, 2—*Criminal Appeal Act*, 1907 (7 *Edw.* 7, *c.* 23), *s.* 3.

When a special verdict is returned under s. 2, sub-s. 1, of the Trial of Lunatics Act, 1883, to the effect that the accused person was guilty of the act or omission charged against him in the indictment as an offence, but was insane at the time when he did the act or made the omission, and an order for his detention is thereupon made under s. 2, sub-s. 2, of the Act of 1883, the accused is "a person convicted on indictment" within the meaning of s. 3 of the Criminal Appeal Act, 1907, and therefore has the right of appeal given by that section. THE KING *v.* IRELAND - - - - - C. C. A. 654

CRIMINAL LAW—*continued.*

3. —— *Evidence—Statement by Prisoner read over to Co-prisoner—Denial of Truth of Statement—Admissibility against Co-prisoner.*

The appellant and another person were arrested on a charge of burglary. The appellant's fellow prisoner thereupon made a voluntary statement to a police officer, confessing his guilt and implicating the appellant in that and other burglaries, and the statement was taken down in writing and signed by him. Subsequently the two prisoners were placed together at the police station, and after being duly cautioned they were charged with the burglary. A police officer then read over the above-mentioned statement to both prisoners, and the appellant denied the truth of the whole of it. At the trial the appellant's fellow prisoner pleaded guilty to the indictment, and the trial proceeded against the appellant. The prosecution tendered in evidence the statement which had been read over in the appellant's presence, when it was objected, upon the authority of *Reg.* v. *Smith*, (1897) 18 Cox, C. C. 470, that such a statement could only be admissible as evidence against the appellant if there had been an admission by him of the truth of the whole or some part of it, and that, as he had denied its truth, it was not admissible. The statement was admitted, and the appellant was found guilty :—

Held that, notwithstanding the appellant's denial of the truth of the allegations contained therein, the statement was admissible against him.

Reg. v. *Smith*, 18 Cox, C. C. 470, not followed. THE KING *v.* THOMPSON - - C. C. A. 640

4. —— *False Pretences—Evidence of other Frauds—Admissibility.*

At the trial of a prisoner on an indictment charging him with obtaining a pony and cart by false pretences on June 4, 1909, evidence was admitted that on May 14, 1909, and on July 3, 1909, the prisoner had obtained provender from other persons by false pretences different from those alleged in the indictment. The prisoner was convicted :—

Held, that the evidence was wrongly admitted, as it did not shew a systematic course of fraud, but merely that the prisoner was of a general fraudulent disposition, and therefore it did not tend to prove the falsity of the representations alleged in the indictment; that although there was sufficient evidence of the false pretences alleged to justify the conviction, the evidence as to the other cases might have influenced the jury, and the conviction must therefore be set aside. THE KING *v.* FISHER - C. C. A. 149

5. —— *Habitual Criminal, Charge of being a—Grounds of Charge—Sufficiency of Notice—Consent of Director of Public Prosecutions—Presumption of—Prevention of Crime Act*, 1908 (8 *Edw.* 7, *c.* 59), *s.* 10.

At the trial of an offender on a charge of being a habitual criminal under the Prevention of Crime Act, 1908, the consent of the Director of Public Prosecutions to the insertion of the charge in the indictment, which is required by that Act, will be presumed in the absence of any

objection by the offender that no such consent was in fact given.

The requirement of s. 10, sub-s. 4, that the notice to the offender of an intention to insert such a charge in the indictment "shall specify the previous convictions and the other grounds upon which it is intended to found the charge," means that the notice shall specify "the other grounds" if any. It does not mean that the previous convictions may not by themselves be sufficient grounds upon which to found the charge. THE KING *v.* WALLER - **C. C. A. 364**

6. —— *Habitual Criminal—Form of Indictment—Crime committed before Act in operation—Sentence of Penal Servitude and Preventive Detention — Appeal against Sentence without Leave—Criminal Appeal Act*, 1907 (7 *Edw.* 7, *c.* 23), *s.* 3 (*c*)—*Prevention of Crime Act*, 1908 (8 *Edw.* 7, *c.* 59), *ss.* 10, 11, 19.

By s. 10, sub-s. 1, of the Prevention of Crime Act, 1908, "where a person is convicted on indictment of a crime committed after the passing of this Act, and subsequently the offender admits that he is or is found by the jury to be a habitual criminal, and the Court passes a sentence of penal servitude, the Court . . . . may pass a further sentence ordering that on the determination of the sentence of penal servitude he be detained for such period not exceeding ten nor less than five years, as the Court may determine, and such detention is hereinafter referred to as preventive detention . . . ." By sub-s. 2, "a person shall not be found to be a habitual criminal unless the jury finds on evidence (*a*) that since attaining the age of sixteen years he has at least three times previously to the conviction of the crime charged in the said indictment been convicted of a crime . . . . and that he is leading persistently a dishonest or criminal life . . . ."

An indictment containing a count under the above section alleged that the prisoner, since attaining the age of sixteen years, had at least three times previously to the crime charged in the indictment been convicted of a crime within the meaning of the Act, and that he was leading persistently a dishonest and criminal life, but it did not allege that the prisoner was a habitual criminal:—

Held, that the count was sufficient, though from the point of view of pleading it would be better to insert an averment that the prisoner is a habitual criminal.

Held, also, that the words in s. 10, sub-s. 1, "crime committed after the passing of this Act," must be read in their natural sense, and that therefore the section applies in the case of a crime committed after the passing of the Act and before it came into operation, where the conviction takes place after the Act came into operation.

By s. 3 (*c*) of the Criminal Appeal Act, 1907, a person convicted on indictment may, with the leave of the Court of Criminal Appeal, appeal to the Court against the sentence, unless the sentence is one fixed by law. By s. 11 of the Prevention of Crime Act, 1908, "a person sentenced to preventive detention may, notwithstanding anything in the Criminal Appeal Act, 1907, appeal against the sentence without the leave of the Court of Criminal Appeal."

The Court, without deciding whether "the sentence" in s. 11 of the Prevention of Crime Act, 1908, includes the sentence of penal servitude as well as the sentence of preventive detention, said that they would adopt the practice that a prisoner who appeals against the sentence of preventive detention will be considered as having leave to appeal against the sentence of penal servitude, without the necessity of applying for leave. THE KING *v.* SMITH. THE KING *v.* WESTON - - - **C. C. A. 17**

7. —— *Indecent Assault on Female under Sixteen Years of Age—Consent of Prisoner to be dealt with summarily—Right of Appeal from Conviction — Summary Jurisdiction Act*, 1879 (42 *&* 43 *Vict. c.* 49), *s.* 12—*Children Act*, 1908 (8 *Edw.* 7, *c.* 67), *ss.* 33, 128.

If a person, charged before a Court of summary jurisdiction with an indecent assault on a female who in the opinion of the Court is under the age of sixteen years, consents to be dealt with summarily by virtue of the power conferred on Courts of summary jurisdiction by s. 12 of the Summary Jurisdiction Act, 1879, and s. 128 of the Children Act, 1908, he has no right of appeal under s. 33 of the Act of 1908. THE KING *v.* DICKINSON. *Ex parte* DAVIS **Div. Ct. 469**

8. —— *Pleading—Indictment—Receiving—Omission of "feloniously"—Common Law Misdemeanour — Evidence — Conviction — Criminal Procedure Act*, 1851 (14 *&* 15 *Vict. c.* 100), *ss.* 12, 24—*Larceny Act*, 1861 (24 *&* 25 *Vict. c.* 96), *s.* 91.

An indictment which alleges that the prisoner unlawfully received certain goods well knowing them to have been feloniously stolen, against the form of the statute, &c., but not containing the words "and feloniously" after "unlawfully," is a good indictment for the common law misdemeanour of receiving, and, although the evidence given at the trial on an indictment in that form shews that the stealing was a felony within the Larceny Act 1861, a conviction on that evidence is, by reason of s. 12 of the Criminal Procedure Act, 1851, a good conviction for the common law misdemeanour. THE KING *v.* GARLAND **C. C. A. 154**

9. —— *Practice—Plea of Guilty to Crime charged in Indictment — Further Charge in Indictment of being Habitual Criminal—Swearing Jury—Evidence of Consent of Director of Public Prosecutions — Evidence of Notice of Intention to insert Charge to Officer of Court and to Prisoner—Length of Notice—Admissibility of Evidence of Previous Convictions—Grounds of Charge of being Habitual Criminal—Form of Sentence — Prevention of Crime Act*, 1908 (8 *Edw.* 7, *c.* 59), *s.* 10.

An indictment under s. 10 of the Prevention of Crime Act, 1908, charged the prisoner with felony and also with being a habitual criminal. The prisoner pleaded guilty to the felony and

not guilty to the charge of being a habitual criminal:—

Held, that upon the inquiry whether the prisoner was a habitual criminal there was no objection to swearing the jury as for the trial of a felony, although it would have been sufficient to swear them as for the trial of a misdemeanour.

Without laying down any general rule as to how the consent (required by s. 10, sub-s. 4 (*a*)) of the Director of Public Prosecutions to a charge of being a habitual criminal being inserted in an indictment ought to be proved, it will be sufficient if some person who has been in correspondence with the Public Prosecutor is called to say that he received the document containing the consent in the ordinary course of correspondence and believes it to be signed by the Director of Public Prosecutions, but it is not necessary to call a witness who has seen him write.

In order to prove that seven days' notice (required by s. 10, sub-s. 4 (*b*)) of the intention to insert in the indictment a charge of being a habitual criminal has been given to the proper officer of the Court it is not necessary that the officer himself (e.g., the clerk of the peace) should be called, but there must be some proof of the receipt by him of the notice, e.g., by calling his clerk.

Notice to produce the notice (required by s. 10, sub-s. 4 (*b*)) to the offender that it is intended to insert the charge of being a habitual criminal in the indictment is not required in order to render secondary evidence of the contents of the notice to the offender admissible.

The seven days' notice to be given to the officer of the Court and to the offender that it is intended to insert a charge of being a habitual criminal in the indictment is seven clear days' notice.

Before the previous convictions mentioned in s. 10, sub-s. 2 (*a*), can be given in evidence in support of the charge of being a habitual criminal, evidence must be given to shew that the previous convictions were specified in the notice to the offender.

It is not necessary that the notice to the offender of intention to insert a charge of being a habitual criminal in the indictment should contain a statement of the evidence which it is intended to call for the purpose of shewing that he is leading persistently a dishonest or criminal life, but the grounds upon which it is intended to prove that he is leading persistently a dishonest or criminal life must be stated in a general way, e.g., that the prisoner is doing no work and has no honest means of livelihood.

Whether evidence of the prisoner's persistently dishonest or criminal life previous to his last conviction is admissible in evidence in order to prove that he is at present leading a persistently dishonest or criminal life depends on the facts of the case. The evidence may be admissible as a step in proving that he is at present leading a persistently dishonest or criminal life.

If the facts make it doubtful whether the prisoner was over sixteen when the first of the three convictions mentioned in s. 10, sub-s. 2 (*a*), took place, some evidence of that fact must be given. But a statement of the prisoner to that effect would be sufficient.

Where a person is convicted of, or pleads guilty to, having committed a crime charged in the indictment, the Court ought not to pass a sentence for that crime before the jury inquire into a further charge, contained in the indictment, of being a habitual criminal. THE KING *v.* TURNER - - - - - **C. C. A. 346**

10. —— *Receiving Stolen Goods — Goods "found in his possession"—Prevention of Crime Act*, 1871 (34 & 35 *Vict. c.* 112), *s.* 19—*Evidence—Prisoner called as Witness on behalf of Fellow Prisoner — Cross-examination — Criminal Evidence Act*, 1898 (61 & 62 *Vict. c.* 36), *s.* 1 (*e*).

On the trial of a prisoner for receiving goods knowing them to be stolen it was proved that he pawned the goods with a pawnbroker on the day preceding that of his arrest:—

Held, that the goods were "found in his possession" within the meaning of s. 19 of the Prevention of Crime Act, 1871, and that for the purpose of proving guilty knowledge evidence might be given that he had been previously convicted of an offence involving dishonesty.

Reg. v. *Drage*, (1878) 14 Cox, C. C. 85, and *Reg.* v. *Carter*, (1884) 12 Q. B. D. 522, not followed.

Where two prisoners are tried for an offence and one gives evidence on behalf of the other, the prisoner so giving evidence may, under s. 1 (*e*) of the Criminal Evidence Act, 1898, be asked questions in cross-examination tending to criminate him as to the offence charged, none the less because he gave no evidence in support of his own defence. THE KING *v.* ROWLAND **C. C. A. 458**

11. —— *Servant's Character—Giving False Character — Character not in Writing — Conspiracy—Servants' Characters Act*, 1792 (32 *Geo.* 3, *c.* 56), *ss.* 2, 3.

By s. 2 of the Servants' Characters Act, 1792, "if any person or persons shall knowingly and wilfully pretend or falsely assert in writing that any servant has been hired or retained for any period of time whatsoever, or in any station or capacity whatsoever, other than that for which or in which he, she, or they shall have hired or retained such servant in his, her, or their service or employment," such person or persons shall be liable to a penalty. By s. 3, "if any person or persons shall knowingly and wilfully pretend or falsely assert in writing" that any servant was discharged or left his service at any other time than that at which he was discharged or actually left such service, such person or persons shall be liable to a penalty:—

Held, that the words "in writing" in the above sections only qualify the word "assert," and do not apply to the words "knowingly and wilfully pretend," and that therefore the false pretence as to character may be made orally or by conduct and need not be in writing. THE KING *v.* COSTELLO AND BISHOP - **C. C. A. 28**

—— Motor car.

See under MOTOR CAR.

CRIMINAL LAW—*continued.*

—— Slander—Words actionable per se—Innuendo — Criminal offence—Punishment—Liability to summary arrest - 609
See DEFAMATION.

CROSS-APPEAL.
See under APPEAL.

CROSS-EXAMINATION — Evidence — Prisoner called as witness on behalf of fellow prisoner - - - - - - 458
See CRIMINAL LAW. 9.

CUSTOMS AND INLAND REVENUE.
See under REVENUE.

DAMAGES—Sale of goods—Contract induced by fraud of purchaser—Vendor's right to disaffirm contract—Damages for fraud
See BANKRUPTCY. 5. 745

DEBT—Attachment of.
See under ATTACHMENT.

—— Payment—Petitioning creditor—Neglect to appear—Second petition—Leave - 825
See BANKRUPTCY. 2.

DEFAMATION—*Slander—Words actionable per se—Innuendo—Criminal Offence—Punishment—Liability to Summary Arrest.*

Words imputing that the plaintiff has been guilty of a criminal offence, punishable by fine only, but which involves a liability to summary arrest, will not support an action for slander without special damage. HELLWIG *v.* MITCHELL - - - - - **Bray J. 609**

DESPATCH MONEY—Charterparty—Lay days.
See SHIPPING. 3. 600

DETERMINATION — Partnership—Validity of notice of dissolution - - - 846
See PARTNERSHIP.

DEVIATION CLAUSE—Insurance (Marine)—Premium—Subject to "due notice" of deviation—Notice given after loss 132
See INSURANCE (MARINE).

DISBURSEMENTS—Bankruptcy, Trustee in—Default—Penal interest — Liability of surety—Set-off - - -401, 408, n.
See BANKRUPTCY. 6, 7.

DISCOVERY—Documents—Further affidavit of documents—Relevancy of document—Discretion - - - - - - 904
See PRACTICE. 4.

—— Interrogatories—Libel — Innuendo—Interrogatory as to meaning in which defendant used words - - - - 754
See PRACTICE. 3.

DISSOLUTION—Partnership.
See under PARTNERSHIP.

DOCUMENTS—Discovery.
See under DISCOVERY.

DUTY—Inland Revenue.
See under REVENUE.

EDUCATION.
See under SCHOOLS.

ELECTION — To determine tenancy — Relief granted to lessee—Effect on underlease
See LANDLORD AND TENANT. 1. 263

ELEMENTARY EDUCATION.
See under SCHOOLS.

EMPLOYER AND WORKMAN—*Agreement for Employment—Right to terminate—Necessity for Notice.*

An agreement for the employment of a clerk or trade assistant in Africa for two years at a salary at and after the rate of 250*l.* a year provided that the employers might at any time at their absolute discretion terminate the engagement at any earlier date than that specified if they desired to do so :—

Held, that the power to terminate the engagement at an earlier date than that specified could only be exercised after giving reasonable notice. *In re* AFRICAN ASSOCIATION, LIMITED AND ALLEN - - - - - **Div. Ct. 396**

2. —— *Children, Unlawful Employment of—Contract between Employer and Child—Engagement of Child by Servant of Employer—Liability of Employer—Employment of Children Act*, 1903 (3 *Edw.* 7, *c.* 45), *s.* 3, *sub-s.* 1 ; *s.* 5, *sub-s.* 1 ; *s.* 6, *sub-s.* 3.

By a by-law made under s. 3, sub-s. 1, of the Employment of Children Act, 1903, no child shall be employed between certain hours ; and by s. 6, sub-s. 3, of the Act, "where an employer is charged" with an offence under the Act he shall be entitled upon information laid by him to have the person whom he charges as the actual offender brought before the Court, and if "after the commission of the offence has been proved" the Court is satisfied that the employer had used due diligence to comply with the provisions of the Act, and that the other person had committed the offence in question without the employer's knowledge, consent, or connivance, the other person shall be summarily convicted of the offence, and the employer shall be exempt from any fine.

A vanman in the employment of the respondent, a baker, employed for his own convenience and benefit a child to deliver bread to the respondent's customers during hours forbidden by the by-law. The child was actually engaged and his wages paid by the vanman, and his engagement was a voluntary and gratuitous act on the part of the vanman and formed no part of any arrangement between him and the respondent. The respondent had no knowledge that the child was so employed except during permitted hours.

The respondent was charged with having unlawfully employed the child during prohibited hours contrary to the by-law :—

Held, (1.) that the mere fact that the respondent was charged with the offence did not, in the absence of any evidence of a contract of employment of the child during prohibited hours by or on behalf of the respondent, make it incumbent upon him, under s. 6, sub-s. 3, of the Act, in order to claim exemption from a fine, to

EMPLOYER AND WORKMAN—*continued.*
charge the vanman as the actual offender; (2.) that as there was no evidence of any unlawful employment of the child by the respondent, either directly or by an agent purporting to employ the child on his behalf, no offence by the respondent had been proved. ROBINSON *v.* HILL - - - - - - - **Div. Ct. 94**

3. —— *Compensation—Application to Review—Res judicata—Change of Circumstances—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I.* (3.), (16.).

The amount which an injured workman "is earning or is able to earn in some suitable employment" at the date of an application to review cannot necessarily be finally determined at any period of time, and is therefore not res judicata. The issue on such an application is the same as if it were an original award made at the date of the application to review.

Where subsequent experiment has shewn that the previous decision based on expert evidence was wrong, there is a change of circumstances which will justify an application to review the weekly payments.

Sharman v. *Holliday & Greenwood, Ld.*, [1904] 1 K. B. 235, applied. RADCLIFFE *v.* PACIFIC STEAM NAVIGATION COMPANY - **C. A. 685**

4. —— *Compensation—Basis of Assessment—Concurrent Employment—Professional Services—"Workman"—"Contract of Service"—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 13; *Sched. I., par.* 1 (*b*), *par.* 2 (*b*).

A laundry girl, aged nineteen, injured her hand from an accident arising out of and in the course of her employment. She earned 7*s.* a week at the laundry and she also gave piano lessons to a man's children at his house at 3*s.* a week. She applied under the Workmen's Compensation Act, 1906, that the latter sum might be taken into account under par. 2 (*b*) of the First Schedule in assessing the amount of compensation. The county court judge held that qua music teacher she did not come within the definition of workman in the Act and awarded her 7*s.* a week compensation in accordance with par. 1 (*b*), proviso (*b*), of the First Schedule:—

Held, that the question whether an applicant in any particular case was a workman within the Act was a question of fact and that there was evidence to support the finding of the county court judge.

The meaning of "contract of service" discussed. SIMMONS *v.* HEATH LAUNDRY COMPANY - - - - - **C. A. 543**

5. —— *Compensation—Fisherman—Share in Profits—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 7, *sub-s.* 2.

A claimant under the Workmen's Compensation Act, 1906, was employed as engineer upon a steam fishing boat and was paid by a share in the profits with a guarantee from the owners that his share in the profits should never be less than 30*s.* a week:—

Held, that he was remunerated by a share in the profits within the meaning of s. 7, sub-s. 2, of the Act, and was therefore excepted from the

EMPLOYER AND WORKMAN—*continued.*
Act and not entitled to compensation. ADMIRAL FISHING COMPANY *v.* ROBINSON - **C. A. 540**

6. —— *Compensation—Infant—Accident to a Minor—Review of Weekly Payments—Increase—Probable Earnings—Former Employment—Evidence—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I.* (16.).

On an application to review the weekly payments by a workman on attaining twenty-one and more than twelve months after the accident, pursuant to the proviso to clause 16 of Sched. I. of the Workmen's Compensation Act, 1906:—

Held (Buckley L.J. dissenting), on the construction of the proviso, that the probable earnings of the applicant were not to be limited by reference only to the wages earned in the employment of the employer in whose service he was injured or in a like employment, but upon evidence, if necessary, of what the individual workman "would probably have been earning at the date of the review" in the employment which he followed before he entered the employment in which he was injured or in any different employment "if he had remained uninjured," and that the weekly payments might be increased accordingly. EVANS *v.* VICKERS, SONS & MAXIM, LIMITED - - - - **C. A. 554**

7. —— *Compensation—Ship—Quay—Accident—Accident arising out of and in Course of Employment—Evidence—Return to Sphere of Employment—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

The master of a small ship which was lying in Bangor Roads during a trading voyage from Liverpool to Penmaenmawr and back went on shore in the evening, went to a hotel near the quay for half an hour, then returned to the quay and hailed his ship to send a boat. Before the boat reached him he fell off the quay side and was drowned. There was no evidence whether he had gone to the hotel on his own business or on that of the ship, but it was proved that he had a perfect right to be on the quay, and might have been there in discharge of his duty to the ship. His widow claimed compensation under the Workmen's Compensation Act, 1906:—

Held, that the claimant had not discharged the burden laid upon her of proving that the accident arose out of and in the course of her husband's employment, and that she was not entitled to compensation. HEWITT *v.* OWNERS OF SHIP DUCHESS - - - - **C A. 772**

8. —— *Compensation—"Suitable Employment"—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., par.* 3.

The applicant, a collier, whilst getting coal at the coal face in the respondents' colliery, met with an accident owing to a piece of coal flying from the face into his left eye, which was thereby rendered practically useless. The respondents, having paid him compensation for several months, offered him work at the coal face at his old wages, and, on his refusal to accept this work, ceased making any further payments on the ground that the work offered was suitable employment within the meaning of the Workmen's Compensation Act, 1906, so as to

EMPLOYER AND WORKMAN—*continued.*
relieve them from further liability. The county court judge was satisfied on the medical evidence that there was some appreciable increase of risk of injury to the remaining eye, and of injury generally, in working at the coal face with only one available eye instead of two, and was of opinion that this was not quite suitable employment. He therefore made an award in favour of the applicant :—

Held, that the finding of the county court judge meant that the work was not suitable employment, though it came near to suitability, and that, there being evidence to support that finding, it could not be disturbed. EYRE *v.* HOUGHTON MAIN COLLIERY COMPANY, LIMITED **C. A. 695**

9. —— *Compensation — Surgical Operation, Refusal to undergo—Cause of Incapacity—Onus of Proof—Accident—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

A seaman on board ship, having injured his finger as the result of an accident arising out of and in the course of his employment, refused to undergo a slight operation proposed by the ship's doctor. After his discharge he had to have his finger amputated. Upon an application for compensation under the Workmen's Compensation Act, 1906, the county court judge found that the man acted unreasonably in refusing to submit to the operation proposed by the ship's doctor, but, having regard to the conflict of medical testimony, was unable to come to any conclusion upon the question whether the operation would have saved the finger :—

Held, that the employers had failed to discharge the onus which lay upon them of proving that the loss of the finger was due not to the accident, but to the refusal to submit to the operation, and that the man was entitled to compensation. MARSHALL *v.* ORIENT STEAM NAVIGATION COMPANY - - - **C. A. 79**

10. —— *Compensation—Workman — Professional Football Player—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 13.

The applicant, a professional football player, had entered into a written agreement to serve the respondents for one year at a weekly wage by playing football with the respondents' team when required and attend regularly to training and observe the training and general instructions of the club. The training regulations required the players to attend at the ground every day at 10.30 and to be under the orders of the trainer for the day. The applicant met with an accident while playing in a match. The respondents paid him his wages to the end of the year, and he then claimed compensation for permanent incapacity :—

Held, that the applicant was a "workman" within the meaning of the Workmen's Compensation Act, 1906. WALKER *v.* THE CRYSTAL PALACE FOOTBALL CLUB, LIMITED - **C. A. 87**

11. —— *Dispute between Employer and Workman—Subsisting Claims—Power of Court of Summary Jurisdiction to adjust and set off—Claim by Employer to have Damages for Breach of Contract by Workman set off against Wages due to Workman—Employers and Workmen Act*, 1875 (38 & 39 *Vict. c.* 90), *s.* 3, *sub-s.* 1 ; *s.* 4.

An employer preferred a summons against a workman under the Employers and Workmen Act, 1875, claiming damages for the workman's breach of contract in having wrongfully absented himself from the service of the employer. The workman contested the claim.

The employer further claimed that the wages earned by and due to the workman might be ascertained, and that the respective claims for damages and wages might be adjusted and set off by the Court.

At the time the summons was heard a certain sum was due to the workman for wages under his contract, but the workman did not claim his wages in the proceedings and contended that the magistrate had no jurisdiction to set off the damages against the wages :—

Held by Lord Alverstone C.J. and Ridley J. (Darling J. dissenting), that although the workman did not put forward a claim to his wages, the fact that he disputed both claims of the employer constituted "disputes between the employer and workman arising out of their relation as such" and that there were "claims on the part . . . . of the employer" and "on the part . . . . of the workman" respectively which the magistrate had jurisdiction to adjust and set off under ss. 3 and 4 of the Employers and Workmen Act, 1875. KEATES *v.* LEWIS MERTHYR CONSOLIDATED COLLIERIES, LIMITED **Div. Ct. 386**

—— Servants' characters — Giving false character—Conspiracy - - - **28**
See CRIMINAL LAW. 11.

ESTOPPEL — *Res Judicata — Landlord and Tenant—Agreement for Lease—Action for Rent — Defence, no concluded Agreement — Second Action—Defence, Statute of Frauds.*

The plaintiff brought an action for arrears of rent alleged to be due under an agreement for a lease. The defendant relied on the defence that no agreement had been concluded, but did not raise any defence under s. 4 of the Statute of Frauds. Judgment was given for the plaintiff.

Further arrears of rent having accrued due, the plaintiff brought a second action. In this action the defendant raised the defence that there was no memorandum or note in writing of the agreement for the lease sufficient to satisfy the requirements of s. 4 of the Statute of Frauds :—

Held, that the defendant, not having raised his defence in the former action, was precluded from raising it in the second action. HUMPHRIES *v.* HUMPHRIES - - **Div. Ct. 796**

EVIDENCE — Arbitration — Umpire — Witness called by umpire — Misconduct — Removal - - - - - - **327**
See ARBITRATION.

—— Criminal law—Practice.
See under CRIMINAL LAW.

EVIDENCE—*continued.*
—— Registration of voters—Revising barrister —Rules of evidence—Admissibility—Hearsay evidence—Appeal - - **203**
See PARLIAMENT.

—— Workmen's compensation — Accident — Return to sphere of employment—Ship —Quay - - - - - - **772**
See EMPLOYER AND WORKMAN. 7.

EXCISE LICENCE.
See under LICENSING ACTS.

EXECUTION CREDITOR—Wrongful seizure—Absence of malice—Action of trespass
See SHERIFF. **374**

FACTOR—*Mercantile Agent—Goods on Sale or Return—Authority to pledge—Factors Act*, 1889 (52 & 53 *Vict. c.* 45), *ss.* 1, 2.
The plaintiff, a manufacturing jeweller, was accustomed to send articles of jewellery to F., a retail jeweller, for sale on the terms of a letter written by F. to the plaintiff, in which F., after acknowledging that he had had from the plaintiff "on sale or return" the goods entered up to date in a book in the possession of the plaintiff, and that he was liable to account to the plaintiff for such goods, continued: "The goods referred to in that book mentioned are your property, and to remain so until sold or paid for, they being only left with me for the purpose of sale or return, and not be kept as my own stock. The goods I receive from you are to be entered at cost price, and my remuneration for selling them is agreed at one half the profit":—
Held, that upon the construction of the letter as a whole F. was employed as agent for sale; that he was a mercantile agent within the Factors Act, 1889, and as such had implied authority to pledge the goods entrusted to him; consequently that the plaintiff could not recover goods pledged by F. with the defendant without express authority from the plaintiff.
Weiner v. *Gill*, [1906] 2 K. B. 574, explained and distinguished.
Hastings, Limited v. *Pearson*, [1893] 1 Q. B. 62, overruled. WEINER *v.* HARRIS **C. A. 285**

FALSE PRETENCES—Evidence of other frauds —Admissibility - - - - **149**
See CRIMINAL LAW. 4.

FIRE — Trespass — Justification — Act done in preservation of property—Extinguishing fire - - - - - **168**
See TRESPASS.

FISHERMAN — Workmen's compensation — Share in profits - - - - **540**
See EMPLOYER AND WORKMAN. 5.

FOOTBALL PLAYER (PROFESSIONAL)—Workmen's compensation—"Workman" **87**
See EMPLOYER AND WORKMAN. 10.

FOREIGN LITIGANT — Writ — Affidavit by solicitor - - - - - - **41**
See PRACTICE. 5

FORFEITURE—Relief—Writ claiming possession—Election to determine tenancy—Underlease—Relief granted to lessee—Effect on underlease - - - **263**
See LANDLORD AND TENANT. 1.

FRAUD—Bankruptcy—Sale of goods—Contract induced by fraud of purchaser—Vendor's right to disaffirm contract—Mutual dealings—Set-off—Damages for fraud - - - - - - - **745**
See BANKRUPTCY. 5.

—— False pretences—Evidence of other frauds —Admissibility - - - - **149**
See CRIMINAL LAW. 4.

FRAUDS, STATUTE OF—Res judicata—Agreement for lease — Action for rent — Defence, no concluded agreement — Second action — Defence, Statute of Frauds - - - - - - **796**
See ESTOPPEL.

FRIENDLY SOCIETY—Defaulting treasurer—Removal from office—Bankruptcy of treasurer—Preferential debt - **136**
See BANKRUPTCY. 4.

GAME—*Ground Game—Right of killing Ground Game—"Under this Act or otherwise"—Grantee of Right not being Occupier—Ground Game Act*, 1880 (43 & 44 *Vict. c.* 47), *s.* 6.
Sect. 6 of the Ground Game Act, 1880, after providing that no person having a right of killing ground game under the Act or otherwise shall use any firearms for the purpose of killing ground game between certain hours, proceeds to enact that no such person shall, for the purpose of killing ground game, employ spring traps except in rabbit holes:—
Held, that this enactment does not apply to a grantee of the right to kill and take ground game where the grantee is not the occupier of the land over which the right is granted. MAY *v.* WATERS - - - - **Div. Ct. 431**

GARNISHEE ORDER NISI—Attachment of debt—Scotch judgment—Extension to England - - - - - - **339**
See ATTACHMENT.

GAS COMPANY—Additional expense imposed on gas company by reason of existence of tramway—Liability of tramway company - - - - - - - **114**
See TRAMWAY.

GATE — Railway company — Level crossing — Obligation to maintain gate—Straying horse - - - - - - - **615**
See RAILWAY. 3.

GRANT—Highway—Presumption of lost grant —Fee farm rent—Payment for long period - - - - - - - **317**
See HIGHWAY.

GREAT WESTERN RAILWAY COMPANY (RATES AND CHARGES) ORDER CONFIRMATION ACT, 1891 - 778
See RAILWAY. 1.

GROUND GAME.
See under GAME.

GUARDIANS OF THE POOR.
See under POOR LAW.

HABITUAL CRIMINAL.
See under CRIMINAL LAW.

HIGHWAY—*Presumption of Lost Grant—Ex-turnpike Road—Vesting in Local Authority—Land acquired for widening Turnpike Road—Fee Farm Rent—Payment for long Period—Liability of Local Authority—Public Health Act*, 1848 (11 *&* 12 *Vict. c.* 63), *s.* 68.

For more than one hundred years a fee farm rent had been paid to certain charity trustees in respect of a piece of land acquired for the widening of a turnpike road and since forming part of the road, but no conveyance to the turnpike trustees was forthcoming. The rent-charge was paid, first, by the turnpike trustees, who had statutory power to buy land for widening the roads under their control, and, on the expiration of the turnpike trust in 1871 by virtue of the Annual Turnpike Acts Continuance Act, 1870, by the defendant corporation, in whom as the highway authority the road had become vested under the Public Health Act, 1848. The corporation having refused to make any further payments, the charity trustees brought an action against them in the county court for arrears of the rent-charge :—

Held, that the Court ought to presume that the land had been granted to the turnpike trustees as land subject to a perpetual rent-charge, and that the defendant corporation were liable as terre tenants for the payment of the rent-charge. FOLEY'S CHARITY TRUSTEES *v.* DUDLEY CORPORATION - - **C. A. 317**

—— Motor car — Obstruction of highway — Licence—Indorsement—Offence in connection with the driving of a motor car
See MOTOR CAR. 3. **439**

HUSBAND AND WIFE—*Contract—Agreement to pay Wife a Sum of Money in the event of his being guilty of Conduct entitling her to a Separation Order—Validity of Agreement.*

The plaintiff was the defendant's wife. The defendant had been convicted of cruelty to the plaintiff, and a separation order had been made by justices. Upon the making of the order the plaintiff lived apart from her husband. He subsequently entreated her to return and live with him, which she agreed to do on the terms of a deed whereby he covenanted not to assault her or conduct himself in such a way as to entitle her to obtain a further separation order, and that if he committed a breach of that covenant he would pay her a sum of 150*l.*, and the plaintiff covenanted that on payment by him of the 150*l.* she would not demand or receive any weekly sum that might be ordered by justices to be paid to her under any further separation order that she might obtain. The plaintiff returned to live with the defendant, who again assaulted her, whereupon she obtained a further separation order from the justices.

HUSBAND AND WIFE—*continued.*

She then brought her action for the recovery of the 150*l.* due under the covenant :—

Held, that the covenant was not void as against public policy and that the plaintiff was entitled to recover. HARRISON *v.* HARRISON **Walton J. 35**

INCOME TAX—Inland Revenue - **713, 725**
See REVENUE. 1, 2.

INDEMNIFICATION — Bail — Conspiracy — Agreement—No wrongful intent—Act tending to produce a public mischief
See CRIMINAL LAW. 1. **369**

INDEMNITY — Leaseholds — Lien—Right of indemnity — Position of trustee in bankruptcy - - - - - **271**
See LANDLORD AND TENANT. 2.

INDICTMENT—Criminal law.
See under CRIMINAL LAW.

INFANT—*Children—Girl under the Age of Sixteen Years — Encouraging Seduction — Children Act*, 1908 (8 *Edw.* 7, *c.* 67), *s.* 17.

By s. 17 of the Children Act, 1908, it is provided that if any person having the custody, charge, or care of a girl under the age of sixteen years causes or encourages the seduction or prostitution of that girl, he shall be guilty of a misdemeanour :—

Held, that the word "seduction" in the above enactment means inducing a girl to surrender her chastity for the first time.

Therefore where a father having the custody of his daughter, a girl under the age of sixteen years who had already been seduced, subsequently encouraged an illicit intercourse between the girl and her seducer :—

Held, that he did not thereby encourage the seduction of the girl within the meaning of the enactment. THE KING *v.* FREDERICK MOON. THE KING *v.* EMILY MOON - **C. C. A. 818**

—— Children Act, 1908—Summary jurisdiction —Right of appeal from conviction **469**
See CRIMINAL LAW. 7.

—— Unlawful employment of children — Engagement of child by servant of employer—Liability of employer - **94**
See EMPLOYER AND WORKMAN. 2.

—— Workmen's compensation—Accident to a minor—Increase—Probable earnings—Evidence - - - - - **554**
See EMPLOYER AND WORKMAN. 6.

INLAND REVENUE.
See under REVENUE.

INNUENDO — Discovery — Interrogatories — Libel—Interrogatory as to meaning in which defendant used words - **754**
See PRACTICE. 3.

—— Slander — Words actionable per se — Criminal offence — Punishment — Liability to summary arrest - - **609**
See DEFAMATION.

INSURANCE (MARINE)—*Deviation Clause—Agreement that Vessel shall be covered at a Premium to be arranged—Subject to "due Notice" of Deviation—Notice given after Loss.*

Where a policy of marine insurance contains a clause to the effect that in the event of the vessel making any deviation it shall be held covered at a premium to be arranged, "provided due notice be given by the assured on receipt of advice of such deviation":—

Semble that, if the assured is not advised of the deviation until after loss of the vessel, a notice given by him after loss will be sufficient to satisfy the proviso. MENTZ, DECKER & Co. *v.* MARITIME INSURANCE COMPANY **Hamilton J. 132**

INTEREST—Bankruptcy, Trustee in—Default—Penal interest—Liability of surety *See* BANKRUPTCY. 6, 7. **401, 408, n.**

INTERROGATORIES — Discovery — Libel — Innuendo—Interrogatory as to meaning in which defendant used words - **754** *See* PRACTICE. 3.

JUDGMENT—Attachment of debt—Scotch judgment—Extension to England — Garnishee order nisi - - - - **339** *See* ATTACHMENT.

JUDICATURE ACT, 1894—Appeal—"Matter of practice and procedure"—Practice **215** *See* SOLICITOR. 2.

JURISDICTION—Bankruptcy. *See* under BANKRUPTCY.

—— Children Act, 1908—Summary jurisdiction—Right of appeal from conviction **469** *See* CRIMINAL LAW. 7.

—— Summary jurisdiction — Case stated by justices—Notice of appeal—Sufficiency *See* LICENSING ACTS. 3. **452**

—— Summary jurisdiction, Power of Court of, to adjust and set off—Dispute between employer and workman — Subsisting claims - - - - - - **386** *See* EMPLOYER AND WORKMAN. 11.

JUSTICES—*General District Rate—Non-payment—Application for Order for Payment—"Sufficient Cause" for Non-payment — Overpayment of previous Rates—Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 256.

Part of a tramroad, the property of the appellants, lay within the respondents' district, and another part lay within an adjacent district. In 1904 the appellants appealed against a general district rate for that adjacent district to which they had been assessed in respect of the full rateable value of the part of the tramroad within that district, the ground of appeal being that the tramroad was a railway within s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875, and that the appellants were therefore only liable to be assessed in the proportion of one fourth part of its annual value. In 1905 the respondents agreed that, if the appellants should pay the respondents' general district rates for 1905 and 1906, to be levied on an assessment in respect of

JUSTICES—*continued.*

the full rateable value of the part of the tramroad within the respondents' district, the respondents would, in the event of the then pending appeal being successful, repay to the appellants any money overpaid by them for those two rates. The appellants accordingly paid those rates. In 1909 the appeal was decided by the House of Lords in favour of the appellants. Subsequently the respondents applied to justices for an order, under s. 256 of the Public Health Act, 1875, for payment by the appellants of the respondents' general district rate for 1908. On the hearing of the application it was admitted that, in consequence of the House of Lords' decision, the respondents had in hand money overpaid by the appellants for the respondents' 1905 and 1906 rates more than sufficient to satisfy the 1908 rate. The justices made an order for payment:—

Held, that "sufficient cause for non-payment" within the meaning of s. 256 had been shewn, and that the order of the justices must be set aside. BLACKPOOL AND FLEETWOOD TRAMROAD COMPANY *v.* BISPHAM WITH NORBECK URBAN DISTRICT COUNCIL **Div. Ct. 592**

2. —— *Practice—Institution of Prosecution—Consent in Writing of Chief Officer of Police—Absence of Chief Constable—Consent by Police Superintendent—Sunday Observance Act*, 1677 (29 *Chas.* 2, *c.* 7)—*Sunday Observation Prosecution Act*, 1871 (34 *&* 35 *Vict. c.* 87), *ss.* 1 *and* 2, *and Schedule.*

By ss. 1 and 2 and the schedule to the Sunday Observation Prosecution Act, 1871, no prosecution shall be instituted against any person for an offence committed by him under the Sunday Observance Act, 1677, except with the consent in writing of the chief officer of police of the police district in which the offence is committed, or of two justices or a stipendiary magistrate having jurisdiction in the place where the offence is committed; and the "chief officer of police" is defined as meaning in a county "the chief constable . . . . or other officer having the chief command of the police in the police district."

In the county and city of Kingston-upon-Hull a superintendent of police was in fact in chief command of the police in the police district during the temporary absence of the chief constable. He consented to the institution of a prosecution against a person for an offence alleged to have been committed by him under the Sunday Observance Act, 1677. At Kingston-upon-Hull there is no office of deputy chief constable:—

Held, that the superintendent of police had no power to give the consent, inasmuch as the Sunday Observation Prosecution Act, 1871, refers to the "chief officer of police" as a person designated by name, and the superintendent of police did not necessarily come within the definition of that expression contained in the Act. THE KING *v.* HALKETT - **Div. Ct. 50**

—— Children—Girl under the age of sixteen years—Encouraging seduction - **818** *See* INFANT.

—— Criminal law. *See* under CRIMINAL LAW.

JUSTICES—*continued.*

—— Employer and workman, Dispute between —Power of Court of summary jurisdiction to adjust and set off - - **386**
See EMPLOYER AND WORKMAN. 11.

—— Game—Right of killing ground game—Grantee of right not being occupier
See GAME. **431**

—— Licensing Acts.
See under LICENSING ACTS.

—— London — Streets — Paving expenses — Laying out street without sanction of London County Council - - **424**
See LONDON. 2.

—— Master and servant—Unlawful employment of children—Engagement of child by servant of employer - - - **94**
See EMPLOYER AND WORKMAN. 2.

—— Motor car—Obstruction of highway - **439**
See MOTOR CAR.

—— Pleading—Indictment—Receiving — Omission of "feloniously": - - - **154**
See CRIMINAL LAW. 8.

—— Poor law.
See under POOR LAW.

—— Sanitary authority—Sewage flowing into river Thames - - - - **442**
See LOCAL GOVERNMENT.

—— Stamp—Medicinal preparation — Exemption - - - - - - **529**
See REVENUE. 3.

—— Summary jurisdiction.
See under JURISDICTION.

JUSTIFICATION—Trespass—Act done in preservation of property—Extinguishing fire - - - - - - **168**
See TRESPASS.

LADING—Bill of.
See under BILL OF LADING.

LANDLORD AND TENANT—*Forfeiture—Relief—Writ claiming Possession—Election to determine Tenancy—Underlease—Relief granted to Lessee—Effect on Underlease—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 14.

A lease of premises contained a covenant by the lessee to repair, and a proviso for re-entry upon breach of any covenant in the lease. The lessee sub-let to the defendant, the underlease containing a covenant to repair similar to that in the head lease, and a similar proviso for re-entry. The premises having become out of repair, the lessor issued a writ against the lessee to recover possession. The lessee thereupon assigned the lease, subject to and with benefit of the underlease, to an assignee, who obtained an order, under s. 14, sub-s. 2, of the Conveyancing and Law of Property Act, 1881, that all further proceedings in the action should be stayed, and that the assignee should have relief from the forfeiture and should hold the premises according to the old lease without any new lease. The

LANDLORD AND TENANT—*continued.*

assignee then brought an action against the defendant for rent due upon the underlease subsequent to the issue and service of the writ to recover possession:—

Held, affirming the decision of Darling J., [1909] 2 K. B. 894, that though the issue and service of the writ to recover possession operated as a final election by the lessor to determine the lease, the effect of the order for relief was to restore the lease as if it had never become forfeited, and therefore the underlease also remained in existence, and that the plaintiff was entitled to recover. DENDY *v.* EVANS
C. A. 263

2. —— *Leaseholds, Trustee of—Breach of Covenant—Lien—Right of Indemnity—Bankruptcy of Trustee—Debt provable in Bankruptcy—Property held by the Bankrupt as Trustee for any other Person—Position of Trustee in Bankruptcy—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 37, 44.

Where a trustee who holds property to secure his own right of indemnity in priority to all claims of his cestui que trust becomes bankrupt, and the retention of such property—e.g., leaseholds with onerous covenants—is necessary to give full effect to such right, the legal estate in the property and right to possession vest in the trustee in bankruptcy to the extent to which they were vested in the bankrupt.

In 1894 R. was the assignee of leaseholds with onerous covenants as trustee for his wife; in 1895 R. was adjudicated bankrupt; in 1896 the trustee in bankruptcy assigned the leaseholds back again to R. as trustee for his wife, and R. obtained his discharge. In 1908 the lessors, who had had no notice of the fact that R. was a trustee, or of his bankruptcy, brought an action against R. for arrears of rent and for damages for breach of covenant to repair. R. pleaded the bankruptcy proceedings as a defence:—

Held, reversing the decision of Hamilton J., that the leaseholds vested in the trustee in bankruptcy, who held them, subject to satisfying his own lien and right of indemnity, for R.'s wife; that the leaseholds passed back again to R. by the assignment of 1896; and that the bankruptcy was no defence to the action, and R. was liable as assignee. GOVERNORS OF ST. THOMAS'S HOSPITAL *v.* RICHARDSON **C. A. 271**

3. —— *Re-entry for Non-payment of Rent—Recovery of Possession—Half-year's Rent in arrear — "No sufficient distress" — Evidence — Assignee of Lessor—Half-year's Rent accrued due partly before and partly after Assignment—Right of Assignee to maintain Action—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 10—*County Courts Act*, 1881 (51 & 52 *Vict. c.* 43), *s.* 139.

By s. 139 of the County Courts Act, 1888, when the rent of premises does not exceed a certain sum, and is in arrear for a half-year, and the landlord has a right to re-enter for non-payment thereof, the landlord may enter a plaint in the county court for the recovery of the premises, and thereupon a summons shall issue to the tenant, and if the tenant shall not shew good cause why the premises should not be

LANDLORD AND TENANT—*continued.*
recovered, then, on proof (inter alia) "that one half-year's rent was in arrear before the plaint was entered, and that no sufficient distress was then to be found on the premises to countervail such arrear," the judge may order possession of the premises to be given :—

Held, that in order to prove that "no sufficient distress was then to be found on the premises," so as to entitle the landlord to maintain an action for the recovery of possession under the section, it is not necessary that a distress for the half-year's rent shall actually have been levied on the premises, but that the fact of there being no sufficient distress may be proved by other evidence.

A half-year's rent accrued due partly before and partly after the reversion in the premises was assigned, and the assignee brought an action under the above section to recover possession for non-payment of the half-year's rent :—

Held, that he was entitled by virtue of s. 10 of the Conveyancing and Law of Property Act, 1881, to maintain the action. RICKETT *v.* GREEN - - - - - - **Div. Ct. 253**

4. —— *Surrender by Operation of Law—Acceptance of Surrender under Mistake of Fact induced by Tenant—Liability of Tenant for Rent.*

The plaintiff let a house to the defendant, a naval officer, for a term of years subject to a proviso that "should the tenant be ordered away from Portsmouth by the Admiralty he may determine this agreement by giving to the landlord one quarter's notice in writing." During the continuance of the tenancy the defendant received an order from the Admiralty to join a ship for foreign service, but shortly afterwards that order was cancelled. Subsequently to the cancellation the defendant, purporting to act under the terms of the agreement and in the belief that he was thereby entitled to do so, gave the plaintiff a quarter's notice of his intention to give up possession. The plaintiff, in the belief that the defendant was at that time under orders from the Admiralty to leave, resumed possession of the house on the expiry of the notice and advertised it for sale. Subsequently the plaintiff discovered the true facts, and brought the action to recover the rent which had accrued in the interval :—

Held, (1.) that the defendant was under the circumstances not entitled to give the notice to terminate the tenancy; (2.) that, as the non-disclosure of the cancellation of the Admiralty's order was not fraudulent, the fact that the plaintiff accepted the notice under a mistake induced by the act of the defendant did not prevent that acceptance from working a surrender by operation of law; but (3.) that the giving of the notice was a breach of an implied contract in respect of which the plaintiff was entitled to recover the amount of the rent due as damages. GRAY *v.* OWEN - **Div. Ct. 622**

—— Res judicata—Agreement for lease—Action for rent—Defence, no concluded agreement—Second action—Defence, Statute of Frauds - - - - - **796**
See ESTOPPEL.

LARCENY — Pleading—Indictment—Receiving—Omission of "feloniously" - **154**
See CRIMINAL LAW. 8.

LEASE.
See under LANDLORD AND TENANT.

LEASEHOLDS—Trustee in bankruptcy, Position of—Lien—Right of indemnity—Debt provable in bankruptcy - - **271**
See LANDLORD AND TENANT. 2.

LEGACY—Succession duty - - - **703**
See REVENUE. 4.

LEVEL CROSSING—Obligation to maintain gate—Straying horse - - - - **615**
See RAILWAY. 3.

LIBEL — Discovery—Interrogatories—Innuendo—Interrogatory as to meaning in which defendant used words - - - **754**
See PRACTICE. 3.

LICENCE—Motor car.
See under MOTOR CAR.

LICENSING ACTS—*Compensation—Charge on Renewed Licences—Deduction from Rent—Unexpired Term—Reversionary Lease—Licensing Act*, 1904 (4 *Edw.* 7, *c.* 23), *s.* 3, *sub-s.* 3; *Sched. II.*

By s. 3, sub-s. 1, of the Licensing Act, 1904, quarter sessions are directed, when necessary, to impose in respect of all existing on licences renewed in respect of premises within their area certain compensation charges. By sub-s. 3 such deductions from rent as are set out in Sched. II. to the Act may be made by any licence-holder who pays a charge under the section, and also by any person from whose rent a deduction is made in respect of such a charge. By Sched. II. "a person whose unexpired term does not exceed" one year may deduct 100 per cent. of the charge, and the percentage to be deducted is diminished from time to time according to the scale therein contained until it is reduced to 1 per cent. where the unexpired term does not exceed sixty years; but subject to a proviso that the amount deducted shall in no case exceed half the rent.

The defendants were lessees of a public-house under a lease which expired at Christmas, 1909; they were also grantees of a lease of the same public-house for a term commencing from the day but one next after the date of the expiration or sooner determination of the aforesaid lease and enduring until Midsummer, 1935. Quarter sessions having imposed a charge in respect of the public-house under s. 3, sub-s. 1 :—

Held, that the unexpired term did not include the defendants' interest in the reversionary lease, which was a mere interesse termini, and therefore the defendants were persons whose unexpired term did not exceed two years and were entitled to make deductions on that basis.

Decision of A. T. Lawrence J., [1909] 2 K. B. 884, reversed. LORD LLANGATTOCK *v.* WATNEY, COMBE, REID & Co. - **C. A. 236**

2. —— *Compensation Levy—Charges imposed by Compensation Authority for County—County Borough constituted before Charges paid —*

LICENSING ACTS—*continued.*

Separate Commission of the Peace—Charges in respect of Licensed Premises in Borough—Right of Compensation Authority for Borough — Licensing Act, 1904 (4 *Edw.* 7, *c.* 23), *ss.* 3, 8.

The quarter sessions for a county as the compensation authority imposed under s. 3, sub-s. 1, of the Licensing Act, 1904, at the Epiphany sessions, 1908, charges for the ensuing year in respect of all existing on licences renewed in respect of premises within their area. At that date a borough was within the area of the quarter sessions for the county, but it was constituted a county borough as from April 1, 1908, and in July following a separate commission of the peace was granted to it. In October, 1908, the Commissioners of Inland Revenue, under s. 3, sub-s. 2, of the Act, collected the charges imposed by the quarter sessions for the county at the preceding Epiphany sessions, including the charges in respect of licensed premises within the borough, and paid over the amount produced by the charges within the borough to the compensation authority thereof, and the amount produced by the charges in respect of licensed premises in the rest of the county to the compensation authority for the county. The latter authority claimed to be entitled to the amount produced by the charges in respect of premises within the borough as being the authority which had imposed those charges:—

Held, that by virtue of s. 3, sub-s. 2, and s. 8 the compensation authority for the borough were entitled to be paid the amount produced by those charges notwithstanding that they had been imposed by the compensation authority for the county. THE KING *v.* INLAND REVENUE COMMISSIONERS. THE KING *v.* GLAMORGAN JUSTICES. *Ex parte* DAVIES - **Div. Ct. 851**

3. —— *Offence—Canteen—Excise Licence—Sale to Civilian—Licensing Acts*, 1872 (35 & 36 *Vict. c.* 94), *s.* 3; 1902 (2 *Edw.* 7, *c.* 28), *s.* 23—*Summary Jurisdiction—Case stated by Justices—Notice of Appeal—Sufficiency — Summary Jurisdiction Act*, 1857 (20 & 21 *Vict. c.* 43), *s.* 2.

A person who holds a canteen, under the authority of a Secretary of State, and who obtains an Excise licence for the sale of beer in the canteen does not commit an offence under s. 3 of the Licensing Act, 1872, if he sells beer in the canteen to a civilian.

Sect. 2 of the Summary Jurisdiction Act, 1857, provides that a party dissatisfied with the determination by justices of an information may apply to the justices to state a case, and such party shall, "after receiving such case, transmit the same to the Court . . . . first giving notice in writing of such appeal, with a copy of the case so stated, to . . . . the respondent":—

Held by Lord Alverstone C.J. and Bray J. (Bucknill J. dissenting), that the appellants, who sent to the respondent a copy of their notice of application to the justices to state a case, and a copy of the case, had complied with the requirements of s. 2 of the Act of 1857, as to giving notice of appeal.

Form of notice of appeal in Short and Mellor's Crown Office Practice, 2nd ed. at p. 628, approved of. DICKESON & Co. *v.* MAYES - **Div. Ct. 452**

LICENSING ACTS—*continued.*

4. —— *"On" Licence — Application for Renewal — Differentiation between redundant Houses—What Matters Compensation Authority may take into consideration — Licensing Act*, 1904 (4 *Edw.* 7, *c.* 23).

Where under the Licensing Act, 1904, the question of the renewal of two "on" licences was referred to the compensation authority, and the compensation authority were satisfied that only one of them was required for the needs of the neighbourhood:—

Held that, for the purpose of differentiating between the two licensed houses and deciding which of the licences should be renewed, they were entitled to take into consideration what other licences the owners of the respective licensed houses would be willing to surrender and what contribution they would be willing to make to the compensation fund in consideration of the renewal of the licence applied for. THE KING *v.* SHANN - - - - **Div. Ct. 10**

5. —— *Renewal of Licence, Refusal of—Premises subsequently occupied by Club—Order by Court of Summary Jurisdiction that Club be struck off Register—Refusal to renew Licence within Twelve Months preceding Formation of Club—Date from which Period of Twelve Months runs—Licensing Act*, 1902 (2 *Edw.* 7, *c.* 28), *s.* 28, *sub-s.* 1 (*f*)—*Licensing Act*, 1904 (4 *Edw.* 7, *c.* 23), *s.* 1, *sub-ss.* 1, 2; *s.* 8, *sub-s.* 2—*Licensing Rules*, 1904, *r.* 2, *clause* 1.

By s. 28, sub-s. 1 (*f*), of the Licensing Act, 1902, a Court of summary jurisdiction may strike a club off the register on the ground that it occupies premises in respect of which within twelve months next preceding the formation of the club the renewal of a licence has been refused.

By ss. 1 and 8, sub-s. 2, of the Licensing Act, 1904, coupled with the definition contained in r. 2, clause 1, of the Licensing Rules, 1904, the power in a county borough to refuse the renewal of an existing on licence (except the power of refusal on certain grounds which do not include redundancy) is transferred from the licensing justices to the "compensation authority," but can only be exercised by that authority on a reference from the licensing justices and on payment of compensation in accordance with the Act.

On May 22, 1908, the compensation authority refused to renew an on licence on the ground of redundancy of the licensed premises. Pending the determination of the amount of compensation payable under the Act of 1904 the licence in respect of the premises was twice provisionally renewed under rr. 41 and 43 respectively of the Licensing Rules, 1904. On June 5, 1909, the compensation was paid to the persons interested, and on June 9, 1909, the premises which had remained open under the provisional renewals of the licence were closed. On June 10, 1909, the premises were opened as a club:—

Held, that the renewal of the licence was refused within the meaning of s. 28, sub-s. 1 (*f*), of the Licensing Act, 1902, on March 22, 1908, the date when the compensation authority actually gave their decision refusing to renew, and not

LICENSING ACTS—*continued.*
on June 9, 1909, when the refusal became operative by the closing of the licensed premises, and that, as the renewal of the licence had not been refused within twelve months next preceding the formation of the club, the Court of summary jurisdiction had no power to strike the club off the register under the provision contained in s. 28, sub-s. 1 (*f*), of the Act of 1902. PLAISTOW WORKING MEN'S CLUB *v.* HARROD
Div. Ct. 582

6. *Statute—Construction—"Notwithstanding any agreement to the contrary"—Agreement made after passing of Act—Licensing Act*, 1904 (4 *Edw.* 7, *c.* 23), *s.* 3, *sub-s.* 3.

By s. 3, sub-s. 3, of the Licensing Act, 1904, "Such deductions from rent as are set out in the Second Schedule to this Act may, notwithstanding any agreement to the contrary, be made by any licence holder who pays a charge under this section":—

Held, that the words "any agreement to the contrary" include agreements made after the passing of the Act. WOOLER *v.* NORTH EASTERN BREWERIES - - - - **Div. Ct. 247**

—— Income tax — Interest of money — Compensation fund — Deposit at bank — Assessability of quarter sessions - **725**
See REVENUE. 2.

LICENSING RULES, 1904, r. 2, clause 1 - **582**
See LICENSING ACTS. 5.

—— r. 60 - - - - - - - **725**
See REVENUE. 2.

LIEN—Leaseholds—Right of indemnity—Position of trustee in bankruptcy - **271**
See LANDLORD AND TENANT. 2.

LIMITATIONS, STATUTE OF — *Money paid under a Mistake of Fact—Mistake shared by both Parties—Action to recover back—From what Date Statute begins to run—Whether Notice to Defendant of Mistake is necessary to complete Cause of Action.*

Where in answer to an action to recover back money paid under a mistake of fact the defendant relies on the Statute of Limitations the statute must be taken to have run from the date of payment, and not from the date of the discovery of the mistake, nor from the date when the plaintiff might have discovered it by the exercise of reasonable diligence.

Brooksbank v. *Smith*, (1836) 2 Y. & C. Ex. 58, explained.

Where money has been paid under a mistake of fact which was shared by both the party paying and the party receiving it, in order to entitle the payor to maintain an action for the recovery back of the money so paid it is not necessary that he should have given the payee notice of the mistake and demanded repayment. In such a case the cause of action is complete the moment the money is paid.

Freeman v. *Jeffries*, (1869) L. R. 4 Ex. 189, distinguished. BAKER *v.* COURAGE & CO.
Hamilton J. 56

LOCAL AUTHORITY—Highway—Presumption of lost grant—Ex-turnpike road—Vesting in local authority - - - **317**
See HIGHWAY.

LOCAL GOVERNMENT—*Sanitary Authority—Sewage flowing into River Thames—"Caused or suffered" — Thames Conservancy Act*, 1894 (57 & 58 *Vict. c. clxxxvii.*), *s.* 94.

Sewage passed from the premises of private persons and from premises belonging to the respondents, a municipal corporation, into a sewer, vested in the respondents as the sanitary authority, and thence flowed into the river Thames:—

Held, that as regards the sewage which came from the respondents' premises they had "caused or suffered" the sewage to flow into the Thames within the meaning of s. 94 of the Thames Conservancy Act, 1894, but that as regards the sewage coming from the premises of private persons the respondents had not done so.

Reg. v. *Staines Local Board*, (1889) 60 L. T. 261, followed. THAMES CONSERVATORS *v.* GRAVESEND CORPORATION - **Div. Ct. 442**

LONDON — *Buildings — Rebuilding Party Wall — Sale of House by Building Owner — Subsequent Use of Party Wall by Adjoining Owner—Contribution to Expenses of Building—Who entitled to Contribution—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 99.

By the London Building Act, 1894, it is provided that where a building owner rebuilds a party wall, if at any time the adjoining owner makes use of the party wall for building purposes he shall bear a certain proportion of the expense of building the wall; and by s. 99 of that Act, "Where the adjoining owner is liable to contribute to the expenses of building any party structure, then until such contribution is paid the building owner at whose expense the same was built shall stand possessed of the sole property in the structure":—

Held, that the words "the building owner at whose expense the same was built" mean the building owner or his assigns as the case may be, and that where the building owner has after rebuilding the party wall sold his house, the purchaser or sub-purchaser who is in possession of the house at the time when the adjoining owner makes use of the party wall is the person who is entitled to receive the contribution. MASON *v.* FULHAM CORPORATION **Div. Ct. 631**

2. —— *Streets — Paving Expenses—Laying out Street without Sanction of London County Council — "New street laid out or made" — Charging estimated Expenses on Frontagers—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 105 — *London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 7, 213.

By s. 105 of the Metropolis Management Act, 1855, the vestry or district board of a parish or district (now the metropolitan borough council) may pave "any new street laid out or made or hereafter to be laid out or made," and charge the frontagers with the estimated expenses thereof. By s. 7 of the London Building Act, 1894, "no person shall commence to form or lay out any street for

LONDON—*continued.*
carriage traffic or for foot traffic without having obtained the sanction of the" London County Council; and s. 200 imposes a penalty for a breach of the above provision. By s. 213, "nothing in this Act shall take away or interfere with the powers of the local authorities with respect to the paving of new streets under the Metropolis Management Acts."

A public road, which before 1907 had been widened, with the sanction of the London County Council, to a width of 20 feet, was in 1907 further widened to a total width of 40 feet, and was laid out as a street without the sanction but with the knowledge of the London County Council, and houses were erected on each side. The appellants, within whose district the street lay, thereupon decided to pave the street as a new street under s. 105 of the Metropolis Management Act, 1855, and apportioned the estimated expenses among the frontagers. The respondent, who was one of the frontagers, contended that, as the street had been formed and laid out without the consent of the London County Council, it had been illegally formed and laid out, and that therefore s. 105 of the Act did not apply so as to entitle the appellants to apportion the expenses:—

Held, that as the street was in fact a new street the appellants had power under s. 105 of the Act of 1855 to pave it and to apportion the estimated expenses among the frontagers. CAMBERWELL CORPORATION *v.* DIXON **Div. Ct. 424**

3. —— *Water Rate*—"*Domestic Purposes*"—"*Railway Purposes*"—*Railway Station*—*Sanitary Conveniences*—*Metropolitan Water Board* (*Charges*) *Act*, 1907 (7 *Edw.* 7, *c. clxxi.*), *ss.* 8, 16, 25.

The Metropolitan Water Board (Charges) Act, 1907, provides by s. 8 for the supply of water for "domestic purposes" at the request of the owner or occupier of any house or building occupied as a separate tenement within the limits of supply of the Metropolitan Water Board at a rate based on the rateable value of the house or building. The same Act by s. 16 provides for a supply of water by measure for "purposes other than domestic" at the request of any owner or occupier of any premises situate as therein described at rates varying with the quantity supplied. By s. 25 "domestic purposes" are deemed to include water closets and baths of a certain capacity, but are not to include a supply of water for "railway purposes."

A railway company owned a station situate as described in s. 16 and within the limits of supply of the Board. The station was separately rated; it contained no stationmaster's house, but contained waiting rooms, a porter's room, and a booking office; on the up and down platforms were urinals and two water closets, one for passengers and one for the staff; there was also on each platform a tap from which water was drawn for drinking and for cleansing the platform:—

Held by the Divisional Court (Phillimore and Bucknill JJ.), that water supplied by the Board for these purposes was not supplied for "domestic purposes" within the meaning of s. 8, but was supplied for "purposes other than domestic" within the meaning of s. 16 of the Act.

Per Bucknill J., that the water was used for "railway purposes" within the meaning of s. 25. METROPOLITAN WATER BOARD *v.* LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY - - - - - **Div. Ct. 804**

LUNACY — Solicitor—Lunacy of client—Liability of solicitor personally to pay plaintiff's costs - - - - **215**
See SOLICITOR. 2.

MAGISTRATES.
See under JUSTICES.

"**MAINTAIN**"—Local education authority—Duty to "maintain" school - **840**
See SCHOOLS. 1.

MAINTENANCE — Pauper — Principle upon which expenses are recoverable - **105**
See POOR LAW.

MARINE INSURANCE.
See under INSURANCE (MARINE).

MARRIED WOMAN.
See under HUSBAND AND WIFE.

MASTER AND SERVANT — Employer and workman.
See under EMPLOYER AND WORKMAN.

MEDICINES—Stamp—Medicinal preparation—Exemption—Contract of apprenticeship not in writing - - - - **529**
See REVENUE. 3.

MERCANTILE AGENT—Authority to pledge
See FACTOR. **285**

METROPOLIS.
See under LONDON.

METROPOLITAN WATER BOARD (CHARGES) ACT, 1907 - - - - - **804**
See LONDON. 3.

MISDEMEANOUR — Pleading — Indictment — Receiving—Omission of "feloniously"—Common law misdemeanour - **154**
See CRIMINAL LAW. 8.

MISTAKE—Money paid under a mistake of fact—Mistake shared by both parties - **56**
See LIMITATIONS, STATUTE OF.

MONEY-LENDER — *Carrying on Business at Registered Address—Cheque for Amount of Loan sent by Post to Borrower—Isolated Part of Transaction — Illegality — Money-lenders Act*, 1900 (63 *&* 64 *Vict. c.* 51), *s.* 2, *sub-s.* 1 (*b*).

The terms of a loan were arranged between a registered money-lender and the borrower at the money-lender's registered address, and the promissory notes which were given as security for the loan were signed there. For the mutual convenience of both parties a cheque for the

MONEY-LENDER—*continued.*

amount of the loan was sent by the money-lender by post to the borrower's address :—

Held, that the mere fact that the cheque for the money advanced was sent to the borrower by post, instead of being handed to the borrower at the money-lender's registered address, did not make the transaction void as being a carrying on of the money-lending business elsewhere than at the registered address in contravention of s. 2, sub-s. 1 (*b*), of the Money-lenders Act, 1900. JACKSON *v.* PRICE - **Darling J. 143**

2. —— *Carrying on Business at Registered Address—Loan made through the Post—Illegality—Money-lenders Act*, 1900 (63 & 64 *Vict. c.* 51), *s.* 2, *sub-s.* 1 (*b*).

The terms of a loan having been arranged by correspondence between the borrower and a money-lender, the latter sent to the former an unsigned promissory note, which the borrower signed and returned to the money-lender, who then sent to the borrower a cheque for the amount of the loan. The money-lender's letters, the unsigned promissory note, and the cheque were all sent by post from the money-lender's registered address to the borrower's residence :—

Held, that the business of the loan had been carried on by the money-lender at his registered address within s. 2, sub-s. 1 (*b*), of the Money-lenders Act, 1900. *In re* SEED. *Ex parte* KING - - - - - - - **Div. Ct. 661**

3. —— "*Usual trade name*" — *Registered Name—Money-lender Partner in a Firm carrying on Money-lending Business at one Address in a Partnership Name—Money-lending Business also carried on by Money-lender in a different Name at a different Address—Money-lenders Act*, 1900 (63 & 64 *Vict. c.* 51), *s.* 2.

By s. 2, sub-s. 1 (*a*), of the Money-lenders Act, 1900, a money-lender shall register himself as a money-lender "under his own or usual trade name, and in no other name" :—

Held, that the expression "usual trade name" means the name by which the money-lender elects at the time of registration to be known, whether he adopted it before or after the commencement of the Act.

Held, further, that a money-lender who carries on business at one address as a member of a firm with a partnership name, and at the same time carries on business alone at another address in a name different from that of the partnership, commits a breach of the provisions contained in s. 2, sub-s. 1 (*b*), of the Act, for which he is liable to a penalty under s. 2, sub-s. 2, and that a promissory note given to him at the address where he carries on business alone, by way of security for a loan made by him at that address in the name he uses there, is void. STIRLING *v.* SILBURN & PYMAN **Bucknill J. 67**

4. —— "*Usual trade name*"—*Registration —Carrying on more than one Business—Money-lenders Act*, 1900 (63 & 64 *Vict. c.* 51), *s.* 2.

By s. 2, sub-s. 1 (*a*), of the Money-lenders Act, 1900, a money-lender as defined by the Act must register himself as a money-lender under his own or usual trade name, and in no other

MONEY-LENDER—*continued.*

name, and by s. 2, sub-s. 1 (*b*), he must carry on the money-lending business in his registered name, and in no other name and under no other description, and at his registered address or addresses, and at no other address :—

Held by Fletcher Moulton L.J. and Farwell L.J. (Vaughan Williams L.J. dissenting), that the expression "usual trade name" means the name under which the money-lender has carried on business before registration, and not the name under which he proposes or intends to carry on business from that date.

Held, further, by the whole Court, that s. 2, sub-s. 1 (*b*), operates to prevent a registered money-lender from carrying on business at one address under his own or his usual trade name and also carrying on business at a different address as a partner in a firm registered as money-lenders under a different name. SADLER *v.* WHITEMAN - - - - - **C. A. 868**

MOTOR CAR—*Driver exceeding Speed Limit—Police Trap—Warning given to Driver by Third Person—Wilful Obstruction of Constable in Execution of his Duty—Prevention of Crimes Amendment Act*, 1885 (48 & 49 *Vict. c.* 75), *s.* 2.

Constables were on duty observing and timing the speed of motor cars driven along a certain road with a view to the prosecution of the drivers of such cars as should be travelling at an illegal speed. For that purpose they had measured a certain distance along the road. The defendant warned the drivers of cars which were approaching the measured distance of the presence of the constables and the purpose for which they were there. There was evidence that at the time the warning was given the cars were being driven at an illegal speed, and the drivers upon receipt of the warning slackened their speed and proceeded over the measured distance at a lawful speed, whereby the constables, as the defendant intended, were prevented from obtaining such evidence as would be accepted as sufficient in a police court that the drivers of the cars were committing an offence :—

Held, that the defendant had wilfully obstructed the constables in the execution of their duty within the meaning of the Prevention of Crimes Amendment Acts. BETTS *v.* STEVENS **Div. Ct. 1**

2. —— *Exceeding Speed Limit—Indorsement of Licence—Previous Convictions—Evidence of Identification—Contents of Licence—No Notice to produce—Identity of Name and Address—"Proof of the identity"—Prevention of Crimes Act*, 1871 (34 & 35 *Vict. c.* 112), *s.* 18—*Motor Car Act*, 1903 (3 *Edw.* 7, *c.* 36), *ss.* 3, 4, 9.

The appellant, Lionel Walker Birch Martin, of Ryder Street Chambers, St. James's Street, London, who held a licence to drive a motor car issued by the London County Council and numbered 5080, was in 1909 convicted by a Court of summary jurisdiction of driving a motor car on a public highway at a speed exceeding twenty miles an hour contrary to s. 9 of the Motor Car Act, 1903. It was then proved that the driver of a motor car of the name of Lionel Martin and of the same address as the appellant

MOTOR CAR—*continued.*
had been convicted of a similar offence in 1907; and that a person having the same four names and of the same address as the appellant had held a licence from the London County Council from a date before 1907 continuously down to the present time, that the licence was numbered 5080, and that no one having a London address could have that number except the person having those four names and that address. A police constable gave evidence that he stopped the motor car upon the occasion in 1907, and the driver upon demand produced to him a licence which was issued by the London County Council and numbered 5080. No notice to produce the licence was given. It was next proved by the production of a certified copy of the conviction that a person with the same four names and of the same address as the appellant was convicted of a similar offence in 1908. The appellant, who was represented by counsel at the hearing, absented himself from the Court and was not called as a witness. The justices found upon the above evidence that the appellant was the person who had been convicted on both the former occasions, and they imposed a fine of 20*l.* and ordered his licence to be indorsed:—

Held that, with regard to the conviction in 1907, the evidence of the police constable as to the contents of the licence produced to him on the occasion when the offence was committed was admissible as evidence of the identity of the appellant with the person who was then convicted, and that no notice to produce the licence was necessary; that, with regard to the conviction in 1908, the identity of the names and of the address was some evidence of the identity of the appellant with the person who was then convicted; and that therefore the justices were entitled to come to the conclusion that the appellant was the person who was convicted on both those occasions and to order his licence to be indorsed.

"Proof of the identity" of the person against whom it is sought to prove the conviction with the person named in the record of the conviction, required by s. 18 of the Prevention of Crimes Act, 1871, does not mean conclusive proof, but means such evidence as will entitle a jury to find that the identity is proved. MARTIN *v.* WHITE - - - **Div. Ct. 665**

3. —— *Licence — Indorsement — Offence in connection with the driving of a Motor Car — Obstruction of Highway — Motor Cars (Use and Construction) Order*, 1904—*Motor Car Act*, 1903 (3 *Edw.* 7, *c.* 36), *s.* 4.

A breach of art IV. of the Motor Cars (Use and Construction) Order, 1904, in allowing a motor car to stand on a highway so as to cause an unnecessary obstruction thereof is not an offence in connection with the driving of a motor car within the meaning of s. 4 of the Motor Car Act, 1903; and therefore a driver who, after being convicted of that breach of the Order of 1904, refuses to produce his licence for the purposes of indorsement cannot be convicted of an offence under the Motor Car Act, 1903. THE KING *v.* YORKSHIRE (WEST RIDING) JUSTICES. *Ex parte* SHACKLETON - - **Div. Ct. 439**

MOTOR CARS (USE AND CONSTRUCTION) ORDER, 1904 - - - - **439**
See MOTOR CAR. 3.

MUTUAL DEALINGS — Bankruptcy—Set-off—Sale of goods — Title of trustee in bankruptcy - - - - - - **745**
See BANKRUPTCY. 5.

MUTUAL DEBTS OR DEALINGS—Bankruptcy—Set-off of debt against purchase-money - - - - - - - **562**
See BANKRUPTCY. 3.

NEGLIGENCE — *Savage Animal — Liability of Owner to Trespassers.*

The defendant, a farmer, occupied a field which adjoined a railway station, and was divided from a footpath by a wire fence. He put into this field a horse which he knew to be bad tempered and to have bitten persons. Members of the public had previously, to the defendant's knowledge, for many years habitually crossed the field without leave, for the purpose of making a short cut from a point on the footpath, where they got over the fence, to a gate near the station. The defendant had warned off persons crossing the field and had complained to the police of persons so crossing as trespassers, but had refused to take legal proceedings against any of them for trespass, assigning as a reason that some of them were his customers for milk. The plaintiff, while so crossing the field without leave from the defendant, was bitten by the horse:—

Held by Vaughan Williams L.J. and Kennedy L.J. (Buckley L.J. dissenting), that the fact that the defendant knew that the public habitually crossed the field without leave as above mentioned did not, under the circumstances, impose upon him towards persons so crossing any duty not to keep an animal such as the horse in question in the field, or to take any care for their protection from risk of being injured by it, and that the defendant was, consequently, not liable to the plaintiff in respect of the injuries sustained by him.

Decision of Divisional Court (reported [1909] 2 K. B. 433) affirmed. LOWERY *v.* WALKER **C. A. 173**

—— School, Duty to maintain — Dangerous condition of premises — Injury to scholar—Local education authority—Liability of authority to action - **840**
See SCHOOLS. 1.

—— School—Local education authority—County council — Duty to maintain school premises - - - - - **736**
See SCHOOLS. 2.

NOTICE—Criminal law—Practice.
See under CRIMINAL LAW.

—— Deviation clause — Insurance (Marine)—Subject to "due notice" of deviation—Notice given after loss - - - **132**
See INSURANCE (MARINE).

—— Employment, Agreement for — Right to terminate—Necessity for notice - **396**
See EMPLOYER AND WORKMAN. 1.

NOTICE—*continued.*

—— Money paid under a mistake of fact—Whether notice to defendant of mistake is necessary to complete cause of action *See* LIMITATIONS, STATUTE OF. **56**

—— Partnership determinable "by mutual arrangement only"—Validity of notice of dissolution - - - - - **846**
See PARTNERSHIP.

—— Summary jurisdiction — Case stated by justices—Notice of appeal—Sufficiency *See* LICENSING ACTS. 3. **452**

PARLIAMENT — *Registration of Voters — Revising Barrister—Rules of Evidence—Admissibility — Hearsay Evidence — Appeal — Parliamentary Registration Act*, 1843 (6 & 7 *Vict. c.* 18), *s.* 65.

A revising barrister, before whom evidence is adduced in support of a claim to be on the list of voters, is bound, if objection is taken to that evidence, to decide the question whether it is admissible by reference to the legal rules on the subject of the admissibility of evidence. If he has so decided that question and has, accordingly, admitted or rejected the evidence, as the case may be, then s. 65 of the Parliamentary Registration Act, 1843, prohibits any appeal from his decision; but that section does not enable him to admit and act on evidence, though objected to, irrespective of the question whether it is admissible or not according to the law of evidence. STOREY *v.* BERMONDSEY TOWN CLERK - - - - - - - - **C. A. 203**

PARTNERSHIP—*Validity of Notice of Dissolution—Partnership determinable "by mutual arrangement only" — Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *ss.* 26, 32.

By s. 26, sub-s. 1, of the Partnership Act, 1890, where "no fixed term" has been agreed upon for the duration of the partnership, any partner may determine it at any time by notice.

By s. 32, "subject to any agreement between the partners," a partnership "for an undefined time" may be dissolved by notice.

An agreement of partnership was entered into between two persons by which it was provided that the partnership should be terminated "by mutual arrangement only":—

Held, affirming the judgment of a Divisional Court, [1910] 1 K. B. 465, that one of the partners could not determine the partnership by notice against the will of the other partner. MOSS *v.* ELPHICK - - - - - **C. A. 846**

—— Money-lender — "Usual trade name"—Registered name - - - - **67**
See MONEY-LENDER. 3.

PARTY WALL — Rebuilding — Contribution to expenses of building - - - **631**
See LONDON. 1.

PAUPER—Poor law.
See under POOR LAW.

PAVING EXPENSES — Streets — Laying out street without sanction of London County Council - - - - **424**
See LONDON. 2.

PETITION—Bankruptcy.
See under BANKRUPTCY.

PHARMACY ACTS — *Unregistered Pharmaceutical Chemist—Use of "name, title, or sign" —"Pharmacy"—Implication—Pharmacy Act*, 1852 (15 & 16 *Vict. c.* 56), *s.* 12.

Sect. 12 of the Pharmacy Act, 1852, provides that if a person, not being registered under the Act as a pharmaceutical chemist, shall assume, use, or exhibit any name, title, or sign implying that he is a person registered under the Act or that he is a member of the Pharmaceutical Society he shall be liable to a penalty.

The defendant carried on the business of a vendor of medicine at a shop over the door of which was his name followed by the words "The Pharmacy." The defendant was not registered as a pharmaceutical chemist under the Act of 1852:—

Held, that the defendant had not assumed, used, or exhibited a name, title, or sign implying that he was registered under the Act of 1852 or that he was a member of the Pharmaceutical Society. PHARMACEUTICAL SOCIETY OF GREAT BRITAIN *v.* MERCER - - - **Div. Ct. 74**

PLEADING—Indictment—Receiving—Omission of "feloniously" - - - - **154**
See CRIMINAL LAW. 8.

PLEDGE — Mercantile agent—Goods on sale or return—Authority to pledge - **285**
See FACTOR.

POLICE—Motor car—Police trap—Wilful obstruction of constable in execution of his duty - - - - - - **1**
See MOTOR CAR. 1.

—— Sunday observation prosecution—Consent in writing of chief officer of police **50**
See JUSTICES. 2.

POOR LAW—*Maintenance of Pauper—Right of Guardians to recover Expenses of Maintenance—Principle upon which Expenses are recoverable.*

A pauper who has been maintained by the guardians of a poor law union in their infirmary is liable to pay to the guardians a reasonable sum for the necessaries supplied to him. Such necessaries include not only a reasonable sum for the food, clothing, drugs, coal, gas, and water supplied, but also a reasonable sum in respect of the pauper's share of the establishment expenses incurred for the purpose of keeping up the infirmary as a place of residence for the paupers, such as the salaries of the officers of the infirmary, and their rations and uniforms if supplied as part of the terms of their service, the cost of the furniture, of the painting, repairs, and insurance of the building, of timber, and other building materials, and the cleaning of windows, the wages of certain workmen employed therein, a sum for printing and stationery, and the parochial rates payable in respect of the infirmary, and also a sum in respect of the capital cost of the site and building. ST. MARY, ISLINGTON, GUARDIANS OF THE POOR *v.* BIGGENDEN - - - - **Bray J. 105**

PRACTICE — *Costs — Appeal — Cross-Appeal— Dismissal of Appeal and Cross-Appeal with Costs —Taxation—Apportionment of Costs.*

A member of a provident society brought an action against the other members, claiming a declaration that he was entitled to remain a member of the society and to the benefits thereof, and an injunction to restrain the defendants from excluding him therefrom. The defendants by their defence admitted that the plaintiff was entitled to remain a member of the society, and denied that they had done, or threatened to do, anything to entitle the plaintiff to sue for a declaration or injunction as aforesaid. At the trial of the action by a judge without a jury, the judge gave judgment for the defendants, but, thinking that, having regard to the circumstances which gave rise to the action, there had been faults on both sides, he gave the defendants no costs of the action. The defendants appealed against so much of his judgment as refused them their costs, and the plaintiff then gave a cross-notice of intention to contend that the judgment should be entered for the plaintiff with costs. The Court of Appeal on the hearing of the appeals ordered that the defendants' appeal should be dismissed with costs to be taxed, and that the plaintiff's cross-appeal should also be dismissed with costs to be taxed, one set of costs to be set off against the other. There were no separate briefs on the cross-appeal. On the taxation the Master taxed the costs on the principle that the plaintiff was entitled to all his costs of the appeal except so far as they were increased by his cross-notice of appeal, and the defendants' costs should be disallowed except so far as they were increased by the plaintiff's cross-notice of appeal. He therefore allowed the plaintiff items charged in respect of his counsel's briefs and the fees paid to them and to their clerks and disallowed items charged in respect of the defendants' counsel's briefs and the fees paid to them and to their clerks. On appeal to the judge at chambers, he directed the Master to review his taxation by apportioning these costs between the appeal and cross-appeal :—

Held by the Court of Appeal that, upon the terms of the order made by them as applicable to the above-mentioned circumstances, the decision of the learned judge was correct. JONES *v.* STOTT - - - - **C. A. 893**

2. —— *Costs—Taxation—Appeal, Costs of— Documents—Copies used in prior Proceeding— Costs not incurred for Purposes of Appeal.*

Upon interpleader proceedings in the county court with regard to the title to goods taken in execution the claimant succeeded. The county court judge gave the judgment creditors leave to appeal to the Divisional Court upon condition that, if successful, they should not ask for costs of the appeal. The judgment creditors appealed to the Divisional Court. Copies of certain documents, which were necessary for the use of counsel and the judges upon the appeal to the Divisional Court, were provided by the judgment creditors. The Divisional Court dismissed the appeal. The judgment creditors obtained from the Court of Appeal leave to appeal from the

PRACTICE—*continued.*

decision of the Divisional Court, and did so appeal. The before-mentioned copies of documents were necessary, and were used for the purposes of that appeal. That appeal was successful, and the claimant was ordered to pay to the judgment creditors the costs of and incident to the appeal. The bill of costs delivered by the judgment creditors to the claimant included items in respect of the before-mentioned copies of documents, which upon taxation the Master disallowed :—

Held, that these items were rightly disallowed by the Master as not representing costs incurred for the purposes of the appeal to the Court of Appeal. MASSON, TEMPLIER & CO. *v.* DE FRIES ; DE FRIES, CLAIMANT - **C. A. 535**

3. —— *Discovery—Interrogatories—Libel— Innuendo—Interrogatory as to Meaning in which Defendant used Words.*

In an action of libel in which the statement of claim attributed by an innuendo certain meanings to the words complained of, the plaintiff sought to administer to the defendant interrogatories, asking, in substance, whether the defendant intended by the use of those words the meanings attributed to them by the innuendo :—

Held, that such interrogatories were inadmissible. HEATON *v.* GOLDNEY - **C. A. 754**

4. —— *Discovery of Documents—Further Affidavit of Documents—Relevancy of Document — Discretion — Rules of Supreme Court, Order XXXI., r.* 12.

In an action for libel brought by a company in respect of an article published in a newspaper, the effect of which was to state generally that the company had no chance of success, the statement of claim contained an innuendo with regard to the meaning of the alleged libel. The defendants by their defence denied that it bore the meaning attributed to it by the innuendo, or any defamatory meaning ; and they further pleaded in another paragraph that, in so far as the alleged libel consisted of statements of fact, it was true in its natural and ordinary signification, and, in so far as it consisted of criticism or expressions of opinion, it was a fair and bona fide comment upon matters of public interest. The defence gave with the last-mentioned paragraph particulars, which referred to a number of matters relevant to a justification of the libel in the meaning attributed to it by the innuendo, which the defendants repudiated by their pleading. In pursuance of an order for discovery of documents, the plaintiffs made an affidavit in which they scheduled as relevant certain reports made by the directors to the shareholders in the plaintiff company, and balance-sheets of the company appended thereto, containing statements which on the face of them must have been derived from books of account belonging to the company, which were not included in the affidavit. On an application that the plaintiffs should be ordered to make a further affidavit of documents :—

Held by Farwell L.J. and Kennedy L.J. (Vaughan Williams L.J. dissenting), that it being admitted by the plaintiffs' affidavit of documents

PRACTICE—*continued.*

that the before-mentioned reports and balance-sheets were relevant on the issues raised by the defence, and the balance-sheets not being intelligible without those portions of the plaintiff company's books upon which they were founded, the plaintiffs should, upon the principles laid down in *Jones* v. *Monte Video Gas Co.*, (1880) 5 Q. B. D. 556, be ordered to make a further affidavit of documents.

Vaughan Williams L.J. dissented on the ground that, upon the pleadings in the particular case, no sufficiently definite issue of fact was raised upon which the plaintiff company's books of account were shewn to be relevant, and that the application for a further affidavit of documents was in his opinion not made by the defendants for a legitimate purpose, but was made for the purpose of trying to find out facts, not known to the defendants when they published the libel, which would support their defence of fair comment, without their taking upon themselves the responsibility of justifying in respect of the meaning attributed to the libel by the innuendo, which they by their pleading had repudiated. KENT COAL CONCESSIONS, LIMITED *v.* DUGUID - **C. A. 904**

5. —— *Writ—Special Indorsement—Liquidated Demand—Affidavit in support—"Any other person"—Foreign Litigant—Affidavit by Solicitor—Information and Belief—Order* III., *r.* 6; *Order* XIV., *r.* 1.

The plaintiff, who had acted as the legal representative of the defendants during litigation in South America, sent in his bill of costs to their solicitors in England, and afterwards issued a specially indorsed writ against them, claiming 1469*l.* for professional charges and disbursements. An application for leave to sign judgment under Order XIV. was supported by an affidavit made by a member of the English firm of solicitors who represented the plaintiff. The affidavit was sworn in London, and the deponent stated that he was a member of the firm of solicitors acting for the plaintiff; that the defendants were justly and truly indebted to the plaintiff in the sum of 1469*l.* for professional charges; gave the history of the case; and added that it was within his own knowledge that the debt was incurred and was still owing, such knowledge being obtained from correspondence received from the plaintiff and from correspondence and conversations the deponent had had with the defendants' solicitors, and that he was duly authorized by the plaintiff to make the affidavit:—

Held, that there was a liquidated demand, but that the affidavit was irregular, inasmuch as the deponent was not a person who could swear positively to the facts and verify the cause of action and the amount claimed within Order XIV., r. 1, and his affidavit was only made on information and belief. The conditions imposed by the rule were not fulfilled, and the Court had no jurisdiction to make an order under Order XIV. LAGOS *v.* GRUNWALDT - - - **C. A. 41**

—— Appeal.
See under APPEAL.

PREFERENTIAL DEBT—Friendly society—Defaulting treasurer—Removal from office—Bankruptcy of treasurer - **136**
See BANKRUPTCY. 4.

PRESUMPTION—Highway—Lost grant—Fee farm rents—Payment for long period.
See HIGHWAY. **317**

PREVENTION OF CRIMES ACT—Criminal law.
See under CRIMINAL LAW.

—— Motor car.
See under MOTOR CAR.

PRINCIPAL AND SURETY—Trustee in bankruptcy — Default — Penal interest — Liability of surety—Unpaid remuneration of trustee—Set-off—Disbursements
See BANKRUPTCY. 6, 7. - **401, 408, n.**

PROOF—Workmen's compensation—Refusal to undergo operation—Cause of incapacity—Onus of proof - - - - - **79**
See EMPLOYER AND WORKMAN. 9.

PUBLIC HEALTH—Highway.
See under HIGHWAY.

—— Rate—"Sufficient cause" for non-payment
See JUSTICES. 1. **592**

PURCHASER—Vendor and.
See under VENDOR AND PURCHASER.

QUARTER SESSIONS—Assessability of—Income tax—Interest of money—Licensing Act—Compensation fund—Deposit at bank
See REVENUE. 2. **725**

QUAY—Workmen's compensation—Ship—Accident—Evidence—Return to sphere of employment - - - - - **772**
See EMPLOYER AND WORKMAN. 7.

RAILWAY—*Carriage of Goods—Right of Trader to provide Truck—Reduction of Rate where Company does not provide Truck—Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *ss.* 1, 2—*Great Western Railway Company (Rates and Charges) Order Confirmation Act*, 1891 (54 & 55 *Vict. c. ccxxii.*), *Sched. I.*, *s.* 2 (*b*).

A railway company is under no legal obligation to convey on its railway trucks belonging to a trader at all times and in all circumstances, but if a railway company fails to provide sufficient trucks for the conveyance of the merchandise of a particular trader the trader may provide his own trucks, and in that case motive power for the haulage of the trader's trucks is a reasonable facility for the forwarding and delivering of traffic which the railway company must provide under s. 2 of the Railway and Canal Traffic Act, 1854.

By the schedule to the Great Western Railway Company (Rates and Charges) Order Confirmation Act, 1891, s. 2 (*b*), it is provided that in certain cases, where "the company do not provide trucks" in which merchandise is carried on the railway, the rate authorized for conveyance shall be reduced in the manner therein provided:—

Held, that this enactment does not apply to

RAILWAY—*continued.*

a case where, although the company is ready and willing to provide trucks, the trader prefers to, and does, use his own trucks, but only to a case where the trader uses his own trucks in order to supplement a deficiency in the supply of trucks by the company. SPILLERS & BAKERS, LIMITED *v.* GREAT WESTERN RAILWAY COMPANY (ASSOCIATION OF PRIVATE OWNERS OF RAILWAY ROLLING STOCK, INTERVENERS)
Railway and Canal Commission 778

2. —— *Carrier—Damageable Goods carried unpacked—Owner's Risk—Reasonable Condition—Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *s.* 7.

The plaintiff had for many years consigned to the defendants for carriage wooden cisterns lined with lead, which were fitted with a cross-bar, and had attached a lever which projected above the edge of the cistern; they were carried by the defendants unpacked at the ordinary rate of carriage and at company's risk. Many of the crossbars and levers having been broken in transit, owing, as the defendants alleged, to their brittle nature and to their not being protected by packing, the defendants gave notice in 1907 that they were not, and would not be, carriers of certain specified damageable goods (including cisterns) except when they were properly protected by packing. After the notice the plaintiff continued to consign cisterns for carriage by the defendants, but the defendants required him to sign at the time of sending a special consignment note, headed "Consignment note for damageable goods when not protected by packing." The consignment note contained in substance a notice that the defendants would not carry the specified damageable goods (a list of which was given) at company's risk except when properly protected by packing, but that the sender might consign them not so protected if he agreed to relieve the defendants from liability for loss or injury, except on proof that it arose from wilful misconduct on the part of their servants. Then followed a form of agreement by which the sender agreed to the above terms and also to the conditions on the back of the consignment note, one of which conditions was, "The company will not be liable for any loss of, or damage to, or delay of goods resulting from their not being properly protected by packing." There was no alternative rate of carriage. The plaintiff having sued to recover damages for injury done to cisterns in course of transit:—

Held by Buckley L.J. and Kennedy L.J. (Vaughan Williams L.J. dissenting), that the goods were carried by the defendants by virtue of their statutory obligation under s. 2 of the Railway and Canal Traffic Act, 1854, to afford reasonable facilities for the carriage of traffic; that the requirement of packing was not a refusal of reasonable facilities; and that the condition imposed on the carriage of unpacked articles in the signed consignment note was a just and reasonable condition within the meaning of s. 7 of that Act. SUTCLIFFE *v.* GREAT WESTERN RAILWAY COMPANY - **C. A. 478**

3. —— *Level Crossing—Obligation to maintain Gates—Straying Horse—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 47, 61.

Sect. 61 of the Railways Clauses Consolidation Act, 1845, provides that if a railway shall cross a highway, which is a footway, on the level, the company shall erect and maintain good and sufficient gates or stiles on each side of the railway where the highway shall communicate therewith.

The plaintiff's horse, without any negligence on the part of the plaintiff, strayed on to a public footpath, which the defendants' railway crossed on the level, and passed through a gate, erected by the defendants, on to the railway and was killed by a passing train. The fastening of the gate was defective:—

Held, that the defendants had failed to maintain a good or sufficient gate as required by s. 61; that the defendants' duty under the section was not a duty owed only to persons lawfully using the footpath; and that the defendants were liable to the plaintiff for the loss of his horse. PARKINSON *v.* GARSTANG AND KNOTT END RAILWAY COMPANY - - **Div. Ct. 615**

4. —— *Rates—Traffic Management—Difference in Treatment—Undue Preference—Purchase of Land—Special Agreement—Adequate Consideration—Payment in Cash and Services—Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *s.* 2—*Railway and Canal Traffic Act*, 1888 (51 & 52 *Vict. c.* 25), *s.* 27, *sub-ss.* 1, 2.

A "difference in treatment" within the meaning of sub-s. 1 of s. 27 of the Railway and Canal Traffic Act, 1888, between rival traders by a railway company may be justified and explained by an agreement bona fide entered into by the railway company and a trader under which land is taken and arrangements are made for what is to be done on and with reference to the land so taken.

An agreement of purchase made in good faith between a railway company and a trader, whereby the latter receives payment partly in cash and partly in services to be rendered by the railway company on land the subject-matter of the agreement at rates lower than those charged to other traders, is not bad in law as against public policy.

Per Fletcher Moulton L.J.: Agreements for the acquisition of land are not rendered invalid by containing, as part of the consideration from the railway company, stipulations as to easements and services over the land so acquired.

Decision of the Railway and Canal Commissioners, [1909] 1 K. B. 486, affirmed. HOLWELL IRON COMPANY *v.* MIDLAND RAILWAY COMPANY - - - - - - **C. A. 296**

—— Water rate—"Domestic purposes"—"Railway purposes"—Railway station—Sanitary conveniences - - - **804**
See LONDON. 3.

RATES—Railway and canal traffic.
See under RAILWAY.

—— Railway company.
See under RAILWAY.

RATES—*continued.*

—— "Sufficient cause" for non-payment—Overpayment of previous rates - - **592**
See JUSTICES. 1.

—— Water rate.
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RECEIVING—Pleading—Indictment—Omission of "feloniously" - - - - **154**
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RECEIVING STOLEN GOODS — Evidence — Prisoner called as witness on behalf of fellow prisoner—Cross-examination
See CRIMINAL LAW. 9. **458**

RE-ENTRY — For non-payment of rent—Recovery of possession—Right of assignee to maintain action - - - **253**
See LANDLORD AND TENANT. 3.

REGISTRATION—Money-lenders.
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—— Parliamentary registration - - - **203**
See PARLIAMENT.

—— "Pharmacy"—Implication — Unregistered pharmaceutical chemist—Use of "name, title, or sign" - - - - - **74**
See PHARMACY ACTS.

RENT—Action for—Res judicata—Landlord and tenant—Agreement for lease—Defence, no concluded agreement—Second action—Defence, Statute of Frauds - **796**
See ESTOPPEL.

—— Re-entry for non-payment of rent—Recovery of possession—Right of assignee to maintain action - - - **253**
See LANDLORD AND TENANT. 3.

—— Surrender—Acceptance of surrender under mistake of fact induced by tenant—Liability of tenant for rent - - **622**
See LANDLORD AND TENANT. 4.

RES JUDICATA—Landlord and tenant—Agreement for lease—Action for rent—Defence, no concluded agreement—Second action—Defence, Statute of Frauds **796**
See ESTOPPEL.

—— Workmen's compensation—Application to review—Change of circumstances **685**
See EMPLOYER AND WORKMAN. 3.

RESTRAINT OF TRADE.
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RETAINER — Solicitor—Retainer to conduct defence to an action—Lunacy of client—Liability of solicitor personally to pay plaintiff's costs - - - - **215**
See SOLICITOR. 2.

REVENUE—*Income Tax—Deductions—Association of Traders for keeping up Prices—Payments made by Trader to Association—"Money wholly and exclusively laid out or expended for the purposes of such trade"—Income Tax Act,* 1842 (5 *&* 6 *Vict. c.* 35), *s.* 100, *Cases* 1 *and* 2, *r.* 1; *Sched. D.*

The appellants, who were manufacturers of steel hoops, were, with two other firms who carried on similar businesses, members of an association, called the Steel Hoop Manufacturers' Association, which was formed for the purpose of keeping up prices and thus enabling its members to earn larger profits by agreeing to adhere to fixed prices and thereby preventing competition among themselves. By the rules of the association each of the firms was entitled to a fixed percentage of the total orders; the books of each firm shewing the quantities of steel hoops invoiced were to be audited every six months, and an account was then to be made up shewing the proportion due to each firm, and in the event of any firm having invoiced more than its proper percentage it was to pay into a pool the sum of 10*s.* on each ton of the excess, which amount the association distributed in due proportion amongst those firms who had invoiced less than their proportionate quantities. The appellants, in arriving at the amount of the profits of their trade assessable to income tax, claimed to deduct the excess of the total payments made by them to the association over the amounts received therefrom on an average of the three preceding years, such excess consisting of the excess of payments to the pool over the receipts therefrom, and payments towards the administration expenses of the association:—

Held, that the excess so paid by the appellants was "money wholly and exclusively laid out or expended for the purposes of" their trade within the meaning of r. 1 of the rules applicable to cases 1 and 2 of s. 100, Sched. D, of the Income Tax Act, 1842, and that therefore the appellants were entitled to the deduction claimed.
GUEST, KEEN, & NETTLEFOLDS, LIMITED *v.* FOWLER - - - - - **Bray J. 713**

2. —— *Income Tax—Interest of Money—Compensation Fund—Deposit at Bank—Assessability of Quarter Sessions—Payment of Interest without Deduction of Tax—Liability of Payee—Income Tax Act*, 1842 (5 *&* 6 *Vict. c.* 35), *ss.* 40, 43, *Sched. D—Customs and Inland Revenue Act*, 1888 (51 *&* 52 *Vict. c.* 8), *s.* 24, *sub-s.* 3—*Licensing Act*, 1904 (4 *Edw.* 7, *c.* 23), *s.* 3—*Licensing Rules*, 1904, *r.* 60.

Quarter sessions, as the compensation authority under the Licensing Act, 1904, are assessable to income tax in respect of the interest payable upon so much of the compensation fund as is placed upon deposit at a bank.

Sect. 24, sub-s. 3, of the Customs and Inland Revenue Act, 1888—which provides that upon payment of any interest of money charged with income tax under Sched. D, and not payable out of profits or gains brought into charge to such tax, the person paying the interest shall deduct thereout the rate of income tax in force, and shall render an account to the Commissioners of Inland Revenue of the amount so deducted, and such amount shall be a debt from such person to the Crown—does not relieve the person to whom the interest is paid from liability to pay the income tax where the tax has not been deducted

REVENUE—*continued.*
by the person who pays the interest, but merely gives an additional remedy to the Crown against the latter person. GLAMORGAN QUARTER SESSIONS *v.* WILSON - - - **Bray J. 725**

3. —— *Stamp — Medicinal Preparation — Exemption—Chemist "who hath served a regular apprenticeship" — Contract of Apprenticeship not in writing — Medicines Stamp Act*, 1812 (52 *Geo.* 3, *c.* 150), *s.* 2; *Schedule, Special Exemptions.*

Sect. 2 of the Medicines Stamp Act, 1812, imposes a penalty upon any person vending or exposing to sale any packet, box, bottle, pot, phial, or other inclosure containing any of the drugs, preparations, or compositions set forth in the schedule to the Act without a proper paper cover, wrapper, or label duly stamped with the duty charged thereon. The schedule to the Act contains, so far as material, an exemption in the case of mixtures, compositions, or preparations which shall be vended by any surgeon, apothecary, chemist, or druggist "who hath served a regular apprenticeship":—

Held, that in order to constitute a "regular apprenticeship" within the above exemption there must be an apprenticeship under a contract in writing, and that therefore the exemption does not apply where there has been service in fact as an apprentice under an oral contract. KIRKBY *v.* TAYLOR - - - **Div. Ct. 529**

4. —— *Will — Legacy — Payable out of Realty—Application of Income to Maintenance of Legatee—Uncontrolled Discretion of Trustees —Succession Duty—Legacy Duty Act*, 1796 (36 *Geo.* 3, *c.* 52), *s.* 11 — *Stamp Act*, 1815 (55 *Geo.* 3, *c.* 184), *Sched., Part III., r.* 2— *Revenue Act*, 1845 (8 & 9 *Vict. c.* 76), *s.* 4— *Customs and Inland Revenue Act*, 1888 (51 *Vict. c.* 8), *s.* 21, *sub-s.* 2.

A testator devised real estate to trustees upon trust in a certain event (which happened) to apply the whole or so much of the net income as the trustees in their absolute and uncontrolled discretion might deem right for the maintenance of A. The trustees in the exercise of their discretion applied a portion of the income to A.'s maintenance and intended to continue so applying it from time to time:—

Held, that each such application, as and when the income was so applied, became and would become a legacy to A. in respect of which succession duty was and would be payable. ATTORNEY-GENERAL *v.* WADE - **Bray J. 703**

REVISING BARRISTER — Registration of voters — Rules of evidence—Admissibility - - - - - - - **203**
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ROAD.
See under HIGHWAY.

RULES OF THE SUPREME COURT, Order III., r. 6—*Indorsement of Claim* - - **41**
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—— **Order XIV., r. 1**—*Leave to Sign Judgment and Defend where Writ Specially Indorsed* - - - - - - **41**
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RULES OF THE SUPREME COURT—*continued.*
—— **Order XXXI., r. 12**—*Discovery and Inspection* - - - - - - **904**
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SALE OF GOODS—Bankruptcy—Contract induced by fraud of purchaser—Vendor's right to disaffirm contract — Mutual dealings—Set-off—Damages for fraud
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SANITARY AUTHORITY.
See under LOCAL GOVERNMENT.

SANITARY CONVENIENCES — Water rate — "Domestic purposes"—"Railway purposes"—Railway station - - **804**
See LONDON. 3.

SAVAGE ANIMAL—Liability of owner to trespassers - - - - - - **173**
See NEGLIGENCE.

SCHOOLS — *Negligence — Local Education Authority—Provided School—Duty to maintain School — Dangerous Condition of Premises — Injury to Scholar—Liability of Authority to Action—Education Act*, 1902 (2 *Edw.* 7, *c.* 42), *ss.* 5, 7—*Elementary Education Act*, 1870 (33 & 34 *Vict. c.* 75), *ss.* 18, 19.

The plaintiff, a girl aged seven, attended a public elementary school provided by the defendants, the local education authority for the district. This school had formerly belonged to a school board, and was transferred to the defendants upon the coming into operation of the Education Act, 1902. The only mode of entrance into and egress from a class-room in the school was by a doorway closed by a heavy swing door with a powerful spring, which door had been put up by the school board, the defendants' predecessors. The plaintiff, while leaving the class-room, was injured through this door closing on her fingers. The door was in good repair, and in the same condition as it was in when the school was taken over by the defendants. In an action brought by the plaintiff in respect of the injury sustained by her, the jury found that the door was not a suitable one for use by young children, when put up in the first instance, and that the defendants were guilty of negligence in allowing it to remain after the school was transferred to them:—

Held, following the decision in *Ching* v. *Surrey County Council*, [1910] 1 K. B. 736, that, it being the duty of the defendants to keep the school premises in proper condition for the purposes of a school, they were responsible for a breach of duty in not discovering and remedying the improper construction of the door in question, when the school was transferred to them, and therefore the action was maintainable.

Appeal from the judgment of a Divisional Court, [1910] 1 K. B. 159, affirmed. MORRIS *v.* CARNARVON COUNTY COUNCIL - **C. A. 840**
See next case.

2. —— *School (Elementary)—Local Education Authority—County Council—Duty to maintain School Premises—Injury to Pupil caused by Want of Repair—Education Act*, 1902 (2 *Edw.* 7,

SCHOOLS—*continued.*

c. 42), *ss.* 5, 7—*Elementary Education Act*, 1870 (33 & 34 *Vict. c.* 75), *ss.* 5, 18, 19.

The plaintiff, a pupil at a public elementary school provided by the defendants, a county council, as the local education authority, fell, while playing in the playground attached to the school, through his foot being caught in a hole existing in the asphalt pavement of the playground, and, in consequence, sustained injury. In an action brought by the plaintiff against the county council to recover damages for the injury so sustained by him, the jury found that he was injured through the negligence of the defendants :—

Held, affirming the judgment of Bucknill J., that the action was maintainable on the ground that, by the Education Act, 1902, a statutory duty of keeping the school premises in a state of repair was imposed upon the defendants, and they were responsible for neglect of that duty by those who actually managed the school. CHING *v.* SURREY COUNTY COUNCIL - **C. A. 736**

See preceding case.

SCOTTISH ——W—Attachment of debt—Scotch judgment — Extension to England — Garnishee order nisi - - - **339**
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SEDUCTION—Children—Girl under the age of sixteen years—Encouraging seduction
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SEPARATION ORDER — Contract — Husband and wife—Validity of agreement - **35**
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SERVANT—Master and.
See under EMPLOYER AND WORKMAN.

SET-OFF — Bankruptcy — Mutual debts or dealings—Contract by debtor to sell house—Set-off of debt against purchase-money - - - - - - **562**
See BANKRUPTCY. 3.

—— Bankruptcy — Sale of goods — Mutual dealings—Title of trustee in bankruptcy
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—— Bankruptcy, Trustee in—Default—Penal interest—Liability of surety—Disbursements - - - - - **401, 408, n.**
See BANKRUPTCY. 6, 7.

SEWAGE—Sanitary authority—Sewage flowing into river Thames - - - - **442**
See LOCAL GOVERNMENT.

SHERIFF — *Execution Creditor — Wrongful Seizure—Indorsement on Writ of fi. fa.—Debt paid before Writ issued—Absence of Malice—Action of Trespass.*

A solicitor, who had an office in London with a branch office in the country, sued out in London a writ of fi. fa. upon a judgment recovered by his client against the plaintiff in the High Court, and indorsed the writ, in accordance with Order XLII., r. 16, of the Rules of the Supreme Court, 1883, with a direction to the sheriff to levy the amount of the debt. The

SHERIFF—*continued.*

debt had in fact been paid at the solicitor's country office on the same day as and shortly before the writ of fi. fa. was sued out. Neither the solicitor nor his client knew of the payment of the debt. Execution having been levied on the plaintiff's goods, the solicitor was then informed that the debt had been paid, and he withdrew the execution. In an action against the solicitor and his client on the case to recover damages for improperly levying execution, and in the alternative for trespass, it was found that neither the client nor the solicitor who sued out the writ acted maliciously :—

Held, that the defendants were not liable in trespass, nor in the absence of malice were they liable in an action on the case. CLISSOLD *v.* CRATCHLEY - - - - - **Div. Ct. 374**

SHIPPING—*Charterparty — Bill of Lading—Exemptions from Liability—"Without prejudice to this charterparty"—Charterer Indorsee of Bill of Lading—Mutual Rights and Liabilities of Charterer and Shipowner.*

A charterparty provided that a ship should proceed to a port of loading, load a cargo of lawful merchandise, and therewith proceed to a port of discharge for a lump sum freight ; the captain was to sign bills of lading at any rate of freight without prejudice to the charterparty, but not below the charterparty rate ; in certain events, which happened, the charterparty was to constitute the shipowners' authority to the charterers' agent to sign bills of lading in the captain's name ; in the event of receivers of cargo withholding payment of bill of lading freight, the amount so withheld was to be deemed to have been deducted from the lump sum freight and not from any portion of the freight belonging to the charterers, and the accounts between shipowners and charterers were to be adjusted accordingly, and the shipowners were to take any steps necessary to enforce payment by the receivers of cargo of the amount so withheld ; the captain and the shipowners were to have a lien on cargo by bill of lading for freight ; and the charterers' liability was to cease on shipment of cargo provided the same was worth the lump sum freight.

The ship having arrived at the port of loading was put up as a general ship. A certain shipper shipped a cargo of dates and received a bill of lading signed in accordance with the terms of the charterparty by the charterers' agents at that port. The bill of lading contained exceptions from liability which were not those contained in the charterparty. While the ship was on her way to the port of discharge the charterers by their agents made an advance to the shipper, and the bill of lading was indorsed to them as security for the advance. At the port of discharge the charterers presented the bill of lading and received the dates, which were found to be damaged.

The charterers claimed to deduct from the lump sum freight a sum equal to the depreciation in value of the goods by reason of the damage :—

Held that, as the goods were not shipped by the charterers themselves under the charterparty,

SHIPPING—*continued.*

the bill of lading and not the charterparty contained the terms of carriage; that in these circumstances the bill of lading did not prejudice the charterparty; and consequently that, assuming the goods to have been damaged by causes for which the bill of lading as distinguished from the charterparty exempted the shipowners from liability, the charterers were liable to pay the lump sum freight in full. STEAMSHIP CALCUTTA COMPANY, LIMITED *v.* ANDREW WEIR & Co. - - - - **Hamilton J. 759**

2. —— *Charterparty—Contract to load "a cargo not less than 6500 tons but not exceeding 7000 tons"—Construction of Charterparty.*

A charterparty provided that the charterers should load "a cargo of beans not less than 6500 tons but not exceeding 7000 tons . . . . which the said charterers bind themselves to ship not exceeding what she can reasonably stow and carry over and above her cabin, bunkers, tackle, apparel, provisions, and furniture." It also contained the following clause: "Charterers to have the option of underletting the whole or part of the steamer":—

Held, that the charterers were bound to load a full and complete cargo within the limits specified. JARDINE, MATHESON & Co. *v.* CLYDE SHIPPING COMPANY - **Hamilton J. 627**

3. —— *Charterparty — Lay Days — Exceptions—Despatch Money—"Each running day saved."*

A charterparty provided that twenty running days should be allowed for the discharge of the cargo, "holidays and time between 1 P.M. Saturdays and 7 A.M. Mondays excepted," and that the shipowners should pay despatch money "for each running day saved." The discharge of the ship took 12 days 13 hours and was completed at 10 A.M. on Saturday, February 27. If the whole period of time allowed by the charterparty had been taken for the discharge, the lay days, by reason of the excepted time, would not have expired until 9 A.M. on March 10, or 10 days 23 hours after the discharge was actually completed. The shipowners contended that despatch money was only payable in respect of the difference between 20 days and 12 days 13 hours, i.e., 7 days 11 hours.

Held, that the charterers were entitled to despatch money in respect of the subsequent time between 1 P.M. on Saturdays and 7 A.M. on Mondays included in the lay days, the same being running days "saved" within the meaning of the charterparty, and that despatch money was therefore payable in respect of 10 days 23 hours.

The Glendevon, [1893] P. 269, and *Nelson & Sons* v. *Nelson Line, Liverpool*, [1907] 2 K. B. 705, distinguished. *In re* ROYAL MAIL STEAM PACKET COMPANY AND RIVER PLATE STEAMSHIP COMPANY - - - - **Bray J. 600**

4. —— *Charterparty—Loading Time — Colliery Guarantee—Exceptions—Any other Cause beyond Charterer's Control — Construction — "Ejusdem generis" Principle.*

A ship was chartered to proceed to the Alexandra Dock at Hull and there load a cargo of coal in 120 hours on conditions of usual colliery guarantee. The colliery guarantee excepted from the loading time Sundays, holidays, strikes, frosts or storms, any accidents stopping the working, leading, or shipping of the cargo, restrictions or suspensions of labour, lock-outs, delay on the part of the railway company either in supplying wagons or leading the coals, "or any other cause beyond the charterer's control." The ship arrived in the dock and gave notice of readiness to load on July 23, but, owing to the presence of other vessels which had previously arrived and were waiting to load, the turn of the ship to come under a loading tip was not reached until August 1. On a claim by the owners against the charterer for demurrage:—

Held, following *Monsen* v. *Macfarlane*, [1895] 2 Q. B. 562, that the lay hours commenced to run on the arrival of the ship in dock; that the words "any other cause beyond the charterer's control" must be construed as referring to matters ejusdem generis with the antecedent exceptions; that the cause of the delay, namely, the presence of other ships in the dock, was not a matter ejusdem generis with those exceptions, and that the charterer was, therefore, not protected by the exceptions clause and was liable for demurrage.

In re Richardsons and Samuel, [1898] 1 Q. B. 261, followed. *Larsen* v. *Sylvester*, [1908] A. C. 295, distinguished. THORMAN *v.* DOWGATE STEAMSHIP COMPANY - - **Hamilton J. 410**

—— Insurance (Marine).
See under INSURANCE (MARINE).

—— Workmen's compensation — Accident — Evidence—Return to sphere of employment—Quay - - - - **772**
See EMPLOYER AND WORKMAN. 7.

SLANDER.
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SOLICITOR — *Costs — Solicitor and Client — Agreement as to Solicitor's Remuneration—Verbal Agreement that Client should pay no Costs—Right to recover against a Third Party—Attorneys and Solicitors Act*, 1870 (33 & 34 *Vict. c.* 28), *ss.* 4, 5.

A solicitor, who was acting for a client in a county court action in which the client was plaintiff, verbally agreed with him that he, the client, should not pay the solicitor any costs. At the trial of the action the jury returned a verdict for the plaintiff with damages. The county court judge, on the application of the defendant, entered judgment for the plaintiff for the amount of the verdict without costs on the ground that under the proviso to s. 5 of the Attorneys and Solicitors Act, 1870, the plaintiff was not entitled to recover from the defendant more costs than were payable by the plaintiff to his solicitor under the agreement:—

Held, first, apart from the Act of 1870, that the plaintiff could not recover from the defendant more costs than he was liable to pay his solicitor, inasmuch as party and party costs were awarded as an indemnity only; secondly, upon the construction of the Act, that for the purpose

SOLICITOR—*continued.*

of applying the proviso to s. 5 it was not necessary that the agreement should be in writing; consequently that the county court judge had rightly entered judgment for the plaintiff without costs.

Decision of the Divisional Court, [1910] 1 K. B. 99, affirmed. GUNDRY *v.* SAINSBURY **C. A. 645**

2. —— *Retainer to Conduct Defence to an Action—Lunacy of Client—Determination of Solicitor's Authority—Steps in Action taken by Solicitor in ignorance of Determination of Authority—Implied Warranty of Existence of Authority—Liability of Solicitor personally to pay Plaintiff's Costs — Practice — Appeal — "Matter of practice and procedure"—Judicature Act*, 1894 (57 *&* 58 *Vict. c.* 16), *s.* 1, *sub-s.* 4.

Where an authority given to an agent has, without his knowledge, been determined by the death or lunacy of the principal, and, subsequently, the agent has, in the belief that he was acting in pursuance thereof, made a contract or transacted some business with another person, representing that, in so doing, he was acting on behalf of the principal, the agent is liable, as having impliedly warranted the existence of the authority which he assumed to exercise, to that other person, in respect of damage occasioned to him by reason of the non-existence of that authority.

Solicitors were instructed by a client to conduct his defence to an action which was then threatened and was afterwards commenced against him. Before the commencement of the action the client became, and was certified as being, of unsound mind. In ignorance of his unsoundness of mind, and of his having been so certified, the solicitors entered an appearance for him in the action, and delivered a defence, to which the plaintiff replied, and other interlocutory proceedings took place in the action. Subsequently, the action not then having come to trial, the plaintiff's solicitor was informed that the defendant had been certified as being of unsound mind; and an application was made on behalf of the plaintiff at chambers for an order that the appearance and all subsequent proceedings in the action should be struck out, and that the solicitors who had assumed to act for the defendant should be ordered personally to pay the plaintiff's costs of the action up to date, on the ground that they had so acted without authority. The Master made an order that the appearance and subsequent proceedings in the action should be struck out, but refused to make an order for payment of the plaintiff's costs by the solicitors personally, which refusal was on appeal affirmed by the judge at chambers. The plaintiff having appealed to the Court of Appeal:—

Held—(1.) (by Buckley L.J. and Swinfen Eady J.) that the appeal was on a matter of practice and procedure within the meaning of the Judicature Act, 1894, s. 1, sub-s. 4, and, therefore, the appeal lay direct to the Court of Appeal, and not to the Divisional Court;

(2.) (by Vaughan Williams L.J., Buckley L.J., and Swinfen Eady J., Vaughan Williams L.J. doubting), that the solicitors who had taken on

SOLICITOR—*continued.*

themselves to act for the defendant in the action had thereby impliedly warranted that they had authority to do so, and therefore were liable personally to pay the plaintiff's costs of the action.

Smout v. *Ilbery*, (1842) 10 M. & W. 1, questioned.

Collen v. *Wright*, (1857) 8 E. & B. 647, followed. YONGE *v.* TOYNBEE - **C. A. 215**

3. —— *Verbal Agreement as to Costs—No Costs payable by Client—Right to recover from another Person—Solicitor and Client—Attorneys and Solicitors Act*, 1870 (33 *&* 34 *Vict. c.* 28), *ss.* 4, 5.

A solicitor, who was acting for a client in a county court action in which the client was plaintiff, verbally agreed with him that he should not pay the solicitor any costs. At the trial of the action the jury returned a verdict for the plaintiff with damages. The county court judge, on the application of the defendant, entered judgment for the plaintiff for the amount of the verdict without costs, on the ground that under s. 5 of the Attorneys and Solicitors Act, 1870, the plaintiff was not entitled to recover from the defendant more costs than were payable by the plaintiff to his solicitor under the agreement:—

Held, that the fact that the agreement was not in writing did not prevent the application of s. 5, and that the county court judge had rightly entered judgment for the plaintiff without costs. GUNDRY *v.* SAINSBURY - **Div. Ct. 99**

—— Affidavit by solicitor — Information and belief—Foreign litigant - - **41**
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SPECIFIC PERFORMANCE — Bankruptcy — Mutual debts or dealings—Set-off of debt against purchase-money - **562**
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STATUTE — Construction — "Notwithstanding any agreement to the contrary" — Agreement made after passing of Act
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33 & 34 Vict. c. 75, ss. 5, 18, 19—*Elementary Education* - - - - - - 736
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TRADE UNION—*Restraint of Trade—Illegality of Society at Common Law—Rules of Society—Claim to Benefit under Rules—Action against Society—Trade Union Act*, 1871 (34 & 45 *Vict. c.* 31), *ss.* 3, 4.

Where the rules of a society combined provisions for the militant purposes of a trade union and provisions for the provident purposes of a friendly society, and it was provided by one of the rules that members of the society might be expelled, with the result that they would forfeit all future benefit from the funds of the society, for non-compliance with the decisions of committees directing the militant operations of the society or for violating the recognized trade rules of the district :—

Held, that the main object of the society was illegal at common law, as being in restraint of trade, and that the rules relating to its provident purposes were so inseparably connected with that object as to be affected by its illegality, and therefore unenforceable ; and consequently that an action for moneys alleged to have become payable to a member under those rules was not maintainable.

Swaine v. *Wilson*, (1889) 24 Q. B. D. 252, and *Gozney* v. *Bristol Trade and Provident Society*, [1909] 1 K. B. 901, distinguished. RUSSELL *v.* AMALGAMATED SOCIETY OF CARPENTERS AND JOINERS - - - **C. A. 506**

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TRAMWAY—*Additional Expense imposed on Gas Company by reason of Existence of Tramway —Liability of Tramway Company—Interruption of Tramway Traffic by Work executed by Gas Company—Laying down, repairing, altering, or removing new Service Pipe—Repairing, altering, or removing Service Pipe or Main laid before Construction of Tramway — Connecting new Service Pipe with old Main—Tramways Act*, 1870 (33 & 34 *Vict. c.* 78), *s.* 32, *sub-ss.* 2, 5.

By s. 32 of the Tramways Act, 1870, "Nothing in this Act shall take away or abridge any power to open or break up any road along or across which any tramway is laid, or any other power vested in any local authority or road authority for any of the purposes for which such authority is respectively constituted, or in any company, body, or person for the purpose of laying down, repairing, altering, or removing any pipe for the supply of gas or water, or any tubes, wires, or apparatus for telegraphic or other purposes, but in the exercise of such power every such local authority, road authority, company, body, or person shall be subject to the following restrictions ; . . . .

"2. Before they commence any work whereby the traffic on the tramway will be interrupted they shall (except in cases of urgency, in which cases no notice shall be necessary) give to the promoters . . . . notice of their intention to commence such work, specifying the time at which they will begin to do so, such notice to be given eighteen hours at least before the commencement of the work ; . . . .

"5. Any company, body, or person shall not execute such work so far as it immediately affects the tramway except under the superintendence

TRAMWAY—*continued.*

of the promoters, unless they refuse or neglect to give such superintendence at the time specified in the notice for the commencement of the work, or discontinue the same during the progress of the work; and they shall execute such work at their own expense and to the reasonable satisfaction of the promoters: provided that any additional expense imposed upon them by reason of the existence of the tramway in any road or place where any such mains, pipes, tubes, wires, or apparatus shall have been laid before the construction of such tramway shall be borne by the promoters."

A gas company executed work in roads along which a tramway ran, part of which work consisted in laying down new service pipes (so laid for the first time since the construction of the tramway) and connecting the same with their mains, which had been laid down before the construction of the tramway.

In one instance during the execution of the work, where there was a double tram line, the cars of one line were diverted to the other line, and the up and down cars were both carried over the same line for a whole day, such diversion being made at the request of the gas company for the purpose of enabling them to repair a fractured main which was causing a serious escape of gas. In other instances the tramcars were either slowed down or only brought to a standstill for a sufficient time to enable the workmen of the gas company to get out of the trenches under or near the tram lines where they were at work on the pipes of the gas company.

By reason of the existence of the tramway additional expense was imposed upon the gas company in connecting the new service pipes with their mains:—

Held (affirming in part the decision of Phillimore J., reported [1909] 2 K. B. 297), that the gas company were entitled to recover such additional expense from the tramway company under sub-s. 5 of the before-mentioned section, inasmuch as there had been an interruption of the traffic on the tramway within the meaning of sub-s. 2 of that section, and the connection of a new service pipe with the main as aforesaid involved an alteration of the main; but

Held (dissenting in that respect from the decision of Phillimore J.), that the proviso in sub-s. 5 of the above-mentioned section does not apply in the case of work which is not such as to interrupt the traffic on the tramway. *In re* BRISTOL GAS COMPANY AND BRISTOL TRAMWAYS AND CARRIAGE COMPANY - **C. A. 114**

TRESPASS—*Justification—Act done in Preservation of Property—Extinguishing Fire.*

If a fire breaks out on land, the tenant of the sporting rights is entitled to adopt such means on the land for extinguishing the fire as may in the circumstances be necessary for the preservation of his sporting rights. COPE *v.* SHARPE **Div. Ct. 168**

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